Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NEBRASKA BEEF, LIMITED,

Petitioner,

v.

DENNIS GREENING, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents two questions for review by this Court. Resolution of the first may obviate the need to address the second. Nonetheless, both issues independently present an important question on which circuit courts have divided and, in the interest of judicial conformity, need resolution. The questions presented are as follows:

I. Is it permissible for an appellate court to decide whether a *Bivens* cause of action exists against various levels of employees of the United States Department of Agriculture for violations of a private meat packing company's constitutional rights when the existence of a *Bivens* remedy is not necessary to determine whether a plaintiff alleged a violation of a constitutional right of which a reasonable person would be aware and the only basis for the appellate jurisdiction is an interlocutory appeal of a denial of qualified immunity under *Mitchell v. Forsyth*?

II. Does a cause of action under *Bivens* exist against various levels of employees of the United States Department of Agriculture for violations of a private meat packing company's constitutional rights when there is no adequate administrative remedy for the constitutional violations?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eighth Circuit.

The petitioner here and appellee below is Nebraska Beef, Limited.

The respondents here and appellants below are Dennis Greening, Ronald Seitz, Chander Dev, Duane Shonka, Michael Fast, John Doe 1, John Doe 2, Jane Doe 1, and Jane Doe 2.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner state as follows:

There is no parent corporation of Nebraska Beef, Ltd., or a publicly held corporation that owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 398 F.3d 1080, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-8a. The District Court's opinion is reported at 2004 WL 546900, and is reprinted at Pet. App. 9a-20a.

JURISIDICTION

The Court of Appeals entered its judgment on February 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, reprinted in the appendix at Pet. App. 21a-53a, and 7 U.S.C. § 6912(e), reprinted in the Appendix at Pet. App. 77a.

CODE OF FEDERAL REGULATIONS INVOLVED

This case involves provisions of the Code of Federal Regulations, relevant provisions of which are reprinted in the Appendix at Pet. App. 53a-77a.

STATEMENT OF THE CASE

The United States Government is charged with monitoring and ensuring food safety. This case involves

one of the most important industries in the United States – Food Manufacturing. Specifically, this case presents a *Bivens*[1] type constitutional rights challenge by a manufacturer of this nation's food supply against the individual government employees who oversee the process. The issues presented herein are not unique to the food manufacturing industry but are also implicated in any case where an individual seeks redress for violations of their constitutional rights or where a government employee claims to be qualifiedly immune from suit.

The two important issues for this Court to resolve have each evidenced a ready capability for repetition and have caused an acknowledged confusion and complication in the circuit courts. The first, concerning the scope of review available following the denial of qualified immunity and an interlocutory appeal under *Mitchell*,[2] requires resolution to resolve a split among various circuit courts of appeals. The second presents an important federal question regarding the existence of a *Bivens* remedy against United States Department of Agriculture ("USDA") employees for constitutional violations in the context of a suit against individual federal meat inspectors. These two important legal issues pertain not only to the respective rights of various manufacturers in the food industry but rights held by every individual bringing a *Bivens* type claim (or with respect to the qualified immunity issue, a § 1983 claim) against a government employee for violating constitutional rights.

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[1] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

A. Factual Background

This case was decided, and ultimately dismissed, by the Eighth Circuit on the two legal issues stated above following a motion to dismiss. Thus, there is no factual record outside of petitioner's initial Complaint. Accordingly, for the purposes of their motion to dismiss, and subsequent appeal, the respondents must admit all well pleaded facts contained in petitioner's Complaint. Likewise, petitioner is entitled to all reasonable inferences drawn therefrom. *See Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). Though the facts of this matter are not necessary for ultimate determination of the issues presented herein, the brief recitation below will aid in understanding the context for this *Bivens* action.

Respondents in this action are employees at various levels within the USDA, Food Safety and Inspection Service ("FSIS"). Petitioner is the United States' largest privately owned meat packing and processing plant, slaughtering and processing approximately 2,300 beef cattle per day. Prior to commencing operation in October 1995, petitioner applied for, and received, the grant of federal meat inspectors to inspect and mark its products as USDA approved for wholesomeness. Such inspections ensure petitioner is following federally mandated procedures regarding sanitation and conducting business in a way that provides for unadulterated product being distributed to the public for consumption. Since inception, petitioner has worked with and cooperated with the USDA to ensure it produces the highest quality product. The USDA has tested samples of petitioner's product for adulterants, and petitioner has conducted its own testing for adulterants and pathogens in conjunction with the

USDA's testing, all of which have been negative. Throughout petitioner's history, no consumer death or illness related to adulterated beef has been attributed to any product processed by petitioner.

In August 2002, petitioner was informed that the USDA was going to conduct an assessment as a food safety exercise in petitioner's facilities with petitioner's cooperation. Respondent Greening assured petitioner that no FSIS enforcement action could, in any way, result from the assessment. On September 3, 2002, seven FSIS representatives appeared at petitioner's plant to conduct what they termed as a "public health assessment." Following the assessment, and despite Respondent Greening's assertions, the FSIS notified petitioner of the USDA's consideration to suspend FSIS inspections at petitioner's facility based on certain alleged deficiencies in petitioner's HACCP and SSOP systems. *See* 9 C.F.R. § 416.12; 9 C.F.R. § 417 *et seq.*, Pet. App. 53a-65a. In the week following the suspension, petitioner worked to resolve the FSIS perceived issue and met with USDA officials for over three hours via teleconference. Acting Associate Deputy Secretary Barbara Masters communicated that she had conferred with the Des Moines USDA District Office and was of the opinion that the issues between the USDA and petitioner would be resolved without lost production time. However, after the meeting, the Des Moines District Office provided petitioner with oral notification that petitioner's response was inadequate to avoid a suspension of production activities and that it was immediately suspending production activities at the facility, despite acknowledgement by the FSIS that there was *no public food safety issue* present which would warrant the closing of petitioner's operations. This suspension of production activities at the plant

effectively prohibited petitioner from fulfilling its commitments to customers, resulting in the loss of employment to 1,100 employees and roughly $2,750,000.00 a day in lost revenues.

From September 3, 2002, to September 17, 2002, the date upon which the suspension was placed in abeyance, petitioner was subject to an increased, arbitrary and capricious level of regulatory actions pertaining to its production operations by USDA inspection personnel and upper management. This increased, arbitrary and capricious level of regulatory actions has continued to the date of filing of this *Bivens* action and beyond. Respondents have continued to subject petitioner to periods of suspension despite knowledge that no food safety issue is present. This increased, arbitrary and capricious level of regulatory actions is further evidenced by the inspectors' issuance of 58 Non-Compliance Reports ("NRs") for alleged failure to operate its business in accordance with federal regulations despite petitioner having operated its business in a consistent and continuous manner. Petitioner's complaint sets forth the precise nature of many of these arbitrary and capricious acts.

Petitioner asserts that respondents engage in these flagrant violations of federal regulations and guidelines for one or more of the following reasons: a) in furtherance of a conspiracy between respondents to retaliate against other FSIS inspectors who either were working, or had worked at petitioner's plant; b) by the desire and in an effort to gain promotions within the USDA ranks; c) by the desire and in an effort to increase overtime opportunities for themselves and fellow inspectors; d) in retaliation and as intimidation against petitioner for questioning USDA authority and enforcement actions and decisions; e) in an effort to arbitrarily and capriciously select petitioner as an

example of tougher, arbitrary and capricious food safety standards in order to enhance the USDA's public perception and each individual respondent's status within the USDA in response to negative publicity from high profile food recalls; and f) in an arbitrary, capricious and malicious manner to deprive petitioner of its constitutionally protected right to Due Process of Law, Equal Protection of Law, Free Speech and to petition the government for Redress of Grievances.

Contrary to statements contained in the Eighth Circuit opinion, petitioner did not bring this action to challenge the validity or appropriateness of the NRs issued by the respondents. Rather, petitioner asserts that respondents intentionally, knowingly or recklessly violated petitioner's constitutional rights. NRs are simply one of the mediums through which petitioner's rights have been violated. In other words, the individual NRs are not the subject of this litigation; rather they merely evidence the animus toward petitioner and are indicative of the arbitrary and capricious acts of respondents.

B. Proceeding Below

Petitioner, the largest privately owned meatpacking company in the United States, brought this *Bivens* action against nine individual employees of the USDA FSIS to remedy violations of its constitutional right to Due Process, Freedom of Speech and to Redress Grievances. In the district court, the respondents filed a motion to dismiss the action under Fed.R.Civ.P 12(b)(1) and 12(b)(6) based upon several theories which included lack of standing (under 12(b)(1)), failure to exhaust administrative remedies (under 12(b)(1)), nonavailability of a *Bivens* remedy

(under 12(b)(6)) and based upon their claim of qualified immunity (under 12(b)(6)). The district court denied the motion to dismiss on each theory. Pet. App. 9a-20a.

The respondents appealed to the Eighth Circuit based upon the rule first announced in *Mitchell* allowing interlocutory appeals to decide claims to qualified immunity. Despite the interlocutory nature of its appeal, the respondents also asked the Eighth Circuit to decide whether a *Bivens* remedy existed. The petitioner contested the Eighth Circuit's jurisdiction to decide the *Bivens* issue on a *Mitchell*-type interlocutory appeal. The Eighth Circuit held that it had jurisdiction to decide the *Bivens* issue and found that there is no *Bivens* remedy that can be brought against federal meat inspection personnel. Thus, the Eighth Circuit, without addressing qualified immunity, remanded the matter to the district court with instructions to dismiss the case.

With regard to the threshold jurisdictional issue the Eighth Circuit noted that the Supreme Court first recognized jurisdiction over an interlocutory appeal from a denial of qualified immunity in *Mitchell*, *supra*. It also noted its circuit precedent that allowed it to decide "closely related issues of law" when receiving a qualified immunity interlocutory appeal. Pet. App. 3a, *citing*, *Drake v. Scott*, 812 F.2d 395, 399 (8th Cir. 1987), *aff'd on reh'g*, 823 F.2d 239 (8th Cir. 1987). The court explained that in *Drake* the defendants asserted a qualified immunity defense and argued that plaintiff's due process claim failed as a matter of law because Drake had no property interest. Pet. App. 3a, *citing*, *Drake*, 812 F.2d at 398. The *Drake* court reasoned that if the plaintiff did not possess a property interest he could not succeed on his claim, and thus, the issue of qualified immunity need not be decided. Pet. App. 3a, *Drake* at 399. However, the Eighth Circuit ignored the

fact that in deciding the qualified immunity issue which allowed for interlocutory appeal, the *Drake* court had to look at whether there was a clearly established constitutional right; i.e. a property interest. Therefore, *Drake* appropriately assumed jurisdiction over the question of whether there was a cause of action alleged because it necessarily had to decide that issue in addressing qualified immunity. Conversely, here, the Eighth Circuit did not have to decide the availability of a remedy in order to decide whether petitioner stated a violation of a known constitutional right.

The court below also chronicled this Court's decisions pertaining to the scope of appellate jurisdiction following a qualified immunity appeal. Specifically, the court examined *Siegert v. Gilley*, 500 U.S. 226 (1991), *Johnson v. Jones*, 515 U.S. 304 (1995) and *Behrens v. Pelletier*, 516 U.S. 299 (1996). The court noted that in *Siegert* this Court instructed that "[a] necessary comitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." Pet. App. 4a, *citing*, *Siegert*, 500 U.S. at 232. Then, in *Johnson*, this Court "cautioned against expansive jurisdiction" and held that a question involving only evidence sufficiency, i.e., which facts a party may be able to prove at trial, is not appealable. Pet. App. 4a-5a, *citing*, *Johnson*, 515 U.S. at 313. It also noted *Johnson*'s emphasis on the interests of judicial economy. Pet. App. 4a-5a. Finally, the court below turned to *Pelletier* for the proposition that "summary judgment determinations *are* appealable when they resolve a dispute concerning an abstract issue of law relating to qualified immunity – typically, the issue

whether the federal right allegedly infringed was 'clearly' established." Pet. App. 5a (emphasis original) *citing*, *Pelletier*, 516 U.S. at 313.

Despite the common thread of the cited cases, which demonstrates that the issue deemed to be "inextricably intertwined" such to confer expanded *Mitchell* jurisdiction was particular to the violation of a clearly established constitutional right, the Eighth Circuit departed from Supreme Court precedent and other circuit courts to determine that it had jurisdiction to decide the availability of a *Bivens* remedy. The Eighth Circuit contended that the existence of a *Bivens* remedy is "a purely legal question that presents none of the judicial economy concerns addressed in *Johnson*." Pet. App 5a-6a. It noted that if the case were remanded, the respondents would be subject to the costs and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception. Pet. App. 6a. Thus, it determined it had jurisdiction to decide the *Bivens* issue.

In doing so, the Eighth Circuit noted that this Court has been "wary of extending *Bivens* remedies into new contexts. . . ." Pet. App. 6a-7a *citing*, *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). Specifically, the court noted that this Court has not extended *Bivens* remedies "'[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration.'" Pet. App. 7a *citing*, *Schweiker*, 487 U.S. at 421. The court further noted its circuit precedent that the denial of a *Bivens* remedy has been upheld even when the remedial mechanisms for constitutional violations do not provide complete relief.

Pet. App. 7a *citing*, *Sinclair v. Hawke*, 314 F.3d 934, 940 (8th Cir. 2003).

Ultimately, to the Eighth Circuit, it was irrelevant that not only do the remedial mechanisms set forth by Congress in relation to federal meat inspection provide *incomplete* relief to petitioner, but the mechanisms in fact provide *no relief* at all. Instead, the court focused its decision on three factors. First, that Congress has not explicitly created any direct right of action against USDA employees alleged to have committed constitutional violations. Pet. App. 7a. Second, the USDA promulgated a comprehensive regulatory scheme pursuant to the FMIA that includes the right to judicial review under the APA. Pet. App. 7a-8a. Finally, Congress has created a "stringent" exhaustion requirement for grievances filed against USDA employees. Pet. App. 8a *citing*, 7 U.S.C. § 6912(e). With that, the Eighth Circuit remanded the action to the district court with instructions to dismiss the complaint for failure to state a claim upon which relief can be granted, thus denying petitioner any remedy for violations of rights protected by the United States Constitution.

REASONS FOR GRANTING THE PETITION

This Petition presents two independently important legal issues both of which pertain not only to the respective rights of various manufacturers in the food industry but rights held by every individual bringing a *Bivens* type claim against a government employee for violating constitutional rights. The first issue, which has an even broader applicability, is whether, after asserting a qualified immunity defense, a government employee can request, and

ultimately have an appellate court decide, if there is even a cause of action available under the plaintiff's theory of liability. This issue has sweeping implications which involve every qualified immunity defense put forth in any case; including *Bivens* cases and § 1983 claims. Essentially, the Eighth Circuit has opened the door for an immediate interlocutory review of whether there exists a *Bivens* remedy in all cases purporting to bring one. Its decision in that regard is in direct conflict with other circuit court opinions.

Second, if jurisdiction was proper, this Petition presents the issue of whether there is a remedy, under *Bivens*, available to those whose constitutional rights have been violated by USDA inspectors. While the holding below was particular to federal meat inspectors, the decision has implicated nearly every federal program that also has a statutory or regulatory mechanism for administrative appeal of some aspect of its regulatory function. With its opinion in this case the Eighth Circuit has stated that no remedy exists, even if there is absolutely no administrative relief available to remedy the constitutional harm alleged, as long as there is some mechanism for administrative appeals. Again, the Eighth Circuit's opinion on this important issue is at odds with other jurisdictions which have expressly allowed *Bivens* actions against regulatory officials including USDA meat inspectors.

I. This case presents an opportunity for this Court to prevent further erroneous application of its qualified immunity precedent as it relates to pendent appellate jurisdiction and to resolve circuit conflict and uncertainty regarding the breadth of interlocutory jurisdiction following a common *Mitchell*-type appeal.

A. The Eighth Circuit's opinion conflicts in principle with Supreme Court precedent.

The immunity claim presented by the respondent inspectors in this case is distinct from the other defenses they presented to the District Court. The immunity defense alone can be characterized as a defense that is finally determined by the Court and "*effectively lost if the case is erroneously permitted to go to trial.*" *Siegert v. Gilley*, 500 U.S. 226, 233 (1991), *quoting*, *Mitchell*, 472 U.S. at 526 (emphasis added). This is the point missed by the Eighth Circuit's ruling. If qualified immunity is not immediately appealable, all benefit of the defense (not having to participate in discovery or stand trial at all) is forever lost. However, while the result may ultimately be the same, the rationale for interlocutory appellate review is no different for whether there is a *Bivens* remedy than it is for any other dispositive issue.

Unlike qualified immunity there is no right *not* to stand trial on a *Bivens* theory that would be lost by not having immediate appeal of the existence of a *Bivens* remedy. If a district court says there is a cause of action under *Bivens*, the case goes to trial and a defendant can appeal on that basis if they lose. The Eighth Circuit's ruling means that every decision, at the district court level, to allow a *Bivens* cause of action (or any other cause of action to which qualified immunity is a defense) will be

immediately appealable – as long as the defendant also asserts a qualified immunity defense. Again, that is a flawed premise because, just like other "failure to state a cause of action" cases, there is no right to not have to go through trial if the district court erroneously allows the *Bivens* case to go forward.

Indeed it is no different than any defendant claiming that the statute of limitations has run or that a plaintiff lacks standing. *See Triad*, 10 F.3d at 492. Certainly immediate appeal could be judicially economical. But judicial economy is not the only consideration. The real test is what right would be lost. With qualified immunity the defendant has a right to be free from standing trial or participating in discovery if the plaintiff fails to properly allege that they violated a constitutional right of which a reasonable person in their position would be aware. There is no corresponding right not to stand trial or participate in discovery in instances where a district court rules that the plaintiff did state a valid cause of action.

The Eighth Circuit is confusing the assertion of a constitutional right with the remedy available for a violation of that right. *Siegert* states that "[a] necessary comitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232. Therefore, if a court decides that there is no constitutional right, it indeed follows *a fortiori* that there could be no "clearly established" constitutional right and thus, not only is the defendant entitled to qualified immunity but there is no cause of action to begin with. Such is a proper decision

based upon an issue that is "inextricably intertwined" with the qualified immunity issue.

But to extend that rationale to whether or not there is a *remedy* of a clearly established constitutional right conflicts with this Court's precedent, violates the final judgment rule and is an impermissible exercise of jurisdiction. The remedy for a constitutional violation has nothing to do with the existence of a constitutional right, and therefore, it is not inextricably intertwined with the test for qualified immunity. Specifically, whether the government employee violated a clearly established constitutional right of which a reasonable employee in that position would be aware. Only when a decision on the existence of the constitutional right necessarily encompasses whether a cause of action has been stated can an appellate court assume jurisdiction under *Mitchell* of a non-final order.

B. The Eighth Circuit's opinion directly conflicts with other circuit courts of appeals.

In addition to the departure from Supreme Court precedent, the Eighth Circuit's order also departs from other circuit court rulings. In order to resolve this conflict among circuit courts, this Court should again "clarify the analytical structure under which a claim of qualified immunity should be addressed." *See*, *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). The Eighth Circuit ruled that when an appellant takes immediate interlocutory appeal after a denial of qualified immunity, the circuit court also has immediate interlocutory jurisdiction to decide whether the underlying cause of action states a viable claim. The ruling completely ignores the final decision rule and

distorts the rule allowing immediate review of a denial of qualified immunity; a rule applicable to both *Bivens* claims and § 1983 actions brought against state officials. *See Butz v. Economou*, 438 U.S. 478, 504 (1978).

Other circuit courts have correctly decided this issue, and thus, have created a circuit split of which the Eighth Circuit took some note. *See* Pet. App. 6a. For example, in *Kwai Fun Wong v. U.S.*, 373 F.3d 952 (9th Cir. 2004), the Ninth Circuit Court of Appeals was faced with an appeal of a denial of qualified immunity by defendants who were sued under a *Bivens* theory of recovery. The appeal presented what it described as a set of "thorny procedural and substantive questions implicating several areas of constitutional and immigration law[.]" *Kwai Fun Wong*, 373 F.3d at 956.

In *Kwai Fun Wong*, the Ninth Circuit first took note of its undeniable jurisdiction under *Mitchell* which allowed it to decide the qualified immunity issue. *Id.* at 960. It also specifically noted that the appellants raised "several additional issues not ordinarily reviewable on interlocutory appeal." *Id.* In order to reach the "additional issues" the Ninth Circuit explained its ability to exercise pendent appellate jurisdiction over those otherwise nonappealable rulings if they are "inextricably intertwined" with a claim properly brought on interlocutory appeal. *Kwai Fun Wong*, 373 F.3d at 960. The Ninth Circuit explained that issues are inextricably intertwined if they are "'(a) [] so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.'" *Id.* (citation omitted).

One of the "pendent" issues the defendant/appellants asked the Ninth Circuit to address was whether a *Bivens* remedy existed against the individual Immigration and Naturalization agents because, the defendant/appellants urged, the Immigration and Naturalization Act is a comprehensive remedial scheme intended to preclude a damages remedy. *Id.* at 961. The court clearly and simply stated that "interlocutory review of this issue is not available." *Id. citing, Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 871 (9th Cir. 1992). It continued by appropriately pointing out that "[d]eciding this question requires the consideration of entirely distinct legal standards from, and its resolution is not a logical predicate to the resolution of, the qualified immunity issue." *Kwai Fun Wong*, 373 F.3d at 961.

The court also pointed out that a decision on whether a *Bivens* remedy was available is distinguishable from those instances where an appellate court needs to determine the validity of the action brought in order to establish that the district court had jurisdiction to issue its order in the first place. It noted that "'[Jurisdiction] is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . must be decided after and not before the court has assumed jurisdiction over the controversy.'" *Id.* (citations omitted). Therefore, because the court did not need to resolve the issue in order to determine that jurisdiction existed over the matter in the first place, it held that it could not review the district court's decision to infer a *Bivens* remedy. *Id.*

Further evidence of the unsettled nature of what is appropriate for consideration on an interlocutory qualified immunity appeal is presented in *Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993). In *Triad* the Seventh Circuit considered a claim to qualified immunity and noted that "determining whether a plaintiff has asserted a constitutional violation at all is '[a] necessary concomitant to the determination of [qualified immunity].'" *Triad*, 10 F.3d at 496, *quoting*, *Siegert v. Gilley*, 500, U.S. 226, 232 (1991).[3] The court continued by explaining that deciding the "purely legal question" of whether a constitutional violation has been established permits courts to "weed out" frivolous allegations. *Triad*, 10 F.3d at 496.

In a footnote to its rationale, the Seventh Circuit noted that the appellant in *Triad* was attempting to use the quoted language in *Siegert* "as a springboard for now appealing the district court's rulings on otherwise noncurrently appealable issues[,]" specifically, on his statute of limitations defense and his standing defense. *Triad*, 10 F.3d at 496 n. 2. It is particularly telling in relation to this case that later in footnote 2 the Seventh Circuit itself suggests that the scope of its review under *Siegert* is not entirely clear. Particularly, with regard to the standing issue, the court noted that appellant was trying to characterize his standing argument as an issue of "the reach of the federal right." *Id.* While the court disagreed with his

[3] The Seventh Circuit correctly interpreted its jurisdiction in reviewing the appeal of a motion to dismiss, without a factual record, as determining whether the allegation, if true, would amount to a violation of a constitutional right. In the present case, the Eighth Circuit erroneously interprets its duty as determining whether the allegation of a violation of a clearly established constitutional right can be made at all because there is, or is not, an available remedy.

characterization it stated that "[i]f Robinson's contention were correct, then *Siegert* very well could indicate that it would be proper to consider that issue on the merits now." *Id.* Thus, the Seventh Circuit indicates that the issue of the appropriateness of review of the existence of a federal right on a qualified immunity interlocutory appeal is not clear.

II. This case presents an opportunity to ensure uniform application of law, resolve a circuit court division and decide a now unsettled area of *Bivens* precedent.

While petitioner believes the Eighth Circuit did not have jurisdiction to decide whether a *Bivens* remedy existed in this context, even if jurisdiction did exist, this case presents an important issue for this Court's consideration independent of the qualified immunity issue. As is discussed below, other circuit courts have allowed *Bivens* actions against USDA employees in general and FSIS meat inspectors specifically. To allow the Eighth Circuit's ruling in this case to stand would leave the meat processing industry in a position where those located in the Sixth or Ninth Circuits could raise a *Bivens* claim while those in the Eighth Circuit could not. Likewise, the USDA itself has acknowledged the availability of *Bivens* suits against its employees and leaving this decision as it is leaves USDA meat inspectors in different jurisdictions (Ninth and Sixth circuits, *see infra*) working under different standards and liabilities than those in other jurisdictions (Eighth). *See* Pet. App. 1a-8a. Furthermore, those plants large enough to have operations in multiple jurisdictions could potentially have the option of bringing *Bivens* actions in certain jurisdictions

over others in order to circumvent adverse precedent regarding the availability of a *Bivens* action.

A. The Eighth Circuit's decision departs from other circuit courts of appeals.

In *Krusinski v. USDA*, 4 F.3d 994 (Table), 1993 WL 346858 (6th Cir. 1993) (unpublished),[4] the Sixth Circuit Court of Appeals considered the claims of a poultry plant operator that the USDA itself, along with individual inspectors named as defendants, violated his constitutional rights to due process and equal protection. Pet. App. 79a. Specifically the plaintiff alleged several instances where the inspectors made him perform work that was not required and compelled him to clean up cigarette butts and other refuse left by the inspectors. He further alleged that his plant operations were continually and unjustly being shut down so that he could comply with the inspectors' orders, resulting in lost profits and emotional harm. In short, the allegations in *Krusinski* mirror those in the present case in many important respects.

The lower court in *Krusinski* granted the defendant inspectors qualified immunity and the plaintiff appealed. The Sixth Circuit held that the plaintiff had set forth sufficient allegations that the individually named defendants engaged in acts outside the scope of their respective duties and in violation of the plaintiff's constitutional rights. Therefore, the court reversed the grant of immunity and

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[4] Though *Krusinski* is an unpublished opinion, the Sixth Circuit Rules of Practice allow unpublished cases to be cited for their precedential value in relation to a material issue. *See* Sixth Circuit Fed.R.App.P. 28(g).

remanded the case for further *Bivens* proceedings against the individual USDA inspectors.

In addition to the Sixth Circuit, other circuit courts have allowed *Bivens* claims against USDA employees albeit in different contexts from that presented here. For instance, in *Love v. U.S.*, 915 F.2d 1242 (9th Cir. 1989), the Ninth Circuit Court of Appeals allowed plaintiffs to maintain a *Bivens* action against individual employees of the USDA Farmers Home Administration. There, the Ninth Circuit stated that the plaintiffs' "claim that the individual defendants deprived them of property without due process of law stated a valid claim for damages under the Constitution." *Love*, 915 F.2d at 1249 *citing*, *Carlson v. Green*, 446 U.S. 14, 18-19 (1980); other citations omitted. Therefore, "the [plaintiffs] are entitled to plead the *Bivens* claim along with the [Federal Tort Claims Act] claim as an alternative basis for recovery." *Love*, 915 F.2d at 1249.

Following the rule announced in *Love*, and presenting another compelling reason for this Court to decide this issue, a meat processing company filed a *Bivens* action in the United States District Court for the Northern District of California against individual USDA FSIS meat inspectors. *Veal Connection Corp. v. Thompson*, Docket C 96-04486 CW, Pet. App. 89a-145a. There, the district court denied the inspectors' motion to dismiss the *Bivens* claim based upon qualified immunity. The case proceeded to trial at which the inspectors were found liable of violating the meat processor's constitutional rights. Subsequently, the trial judge ordered a new trial on the issue of damages. The case settled in March 2005 before the damages trial occurred.

The need for clarification of the availability of a *Bivens* action is also evidenced in statements made by the USDA itself. In May, 2004, the USDA issued a statement of policy which created a new C.F.R. provision allowing for indemnification of its employees for the legal consequences of their conduct. Pet. App. 146a-152a. In its statement, found at Fed.Reg. 28041, vol. 69, no. 96, May 18, 2004 and reproduced at Pet. App. 146a-152a, the USDA noted that "[l]awsuits against Federal employees in their personal capacities have proliferated since the Supreme Courts [sic] decision in *Bivens*. . . . " Pet. App. 147a. It went on to note that "[a] number of [*Bivens*] actions have been filed against USDA employees." Pet. App. 147a. Accordingly, it chose to provide indemnification based upon certain parameters. *See* Pet. App. 148a, 7 C.F.R. § 1.1501.

The adoption of the indemnification provision clearly demonstrates that the USDA believed *Bivens* suits were commonplace enough to warrant the statement of policy providing indemnification. The statement also demonstrates the need for this Court to provide clear guidance as to whether a *Bivens* suit is even available to potential plaintiffs when they believe a USDA employee is violating a constitutional right. Without doubt there is enough uncertainty as to whether a *Bivens* remedy exists for suits against USDA employees that neither district courts, circuit courts, nor even the agency itself can form a consensus.

B. Existence of a *Bivens* remedy against USDA employees.

The presentment of a *Bivens* claim presents a federal question. *See Butz v. Economou*, 438 U.S. 478, 504 (1978).

In reaching the issue of whether a *Bivens* remedy is available to petitioner in this context, the Eighth Circuit departed from other circuit courts to hold that USDA employees cannot be liable under a *Bivens* theory. Unlike other jurisdictions that recognized an action, the Eighth Circuit focused its short analysis of the issue on three principal findings which it concluded "counseled against extending a *Bivens* remedy." Pet. App. 7a. First, that Congress "has not explicitly created any direct right of action against USDA employees alleged to have committed constitutional violations." Pet. App. 7a. Second, that the USDA has promulgated "a comprehensive regulatory scheme pursuant to the FMIA that includes the right to judicial review under the APA." Pet. App. 7a-8a. Finally, that Congress has created "a stringent exhaustion requirement for grievances filed against USDA employees." Pet. App. 8a.

That Congress has not affirmatively created a direct right of action is not dispositive of the issue. *Bivens* itself was premised on the notion that without creating a remedy directly under the Constitution some violations do not have any remedy at law. If there were such a remedy, creating a *Bivens* remedy would be unnecessary.

Likewise, the "comprehensive regulatory scheme" referenced by the court is a misnomer. It is critical to note that the present action is not simply a case of a regulated entity being heard to complain that the regulator is making mistakes in its regulation. Were that the case, such complaints could, and should, be addressed to the administrative procedures in place and referenced by the Eighth Circuit. However, the complaint here is that the individual inspectors would not only intentionally, knowingly and recklessly write non-compliance reports ("NRs")

but that they took other actions to inhibit petitioner's constitutional rights to Due Process, Free Speech and to petition for Redress of Grievances. There simply is *no* "comprehensive regulatory scheme" in place to remedy these complaints. Many of the actions complained of by petitioner were evidenced by the individual NRs while others had nothing to do with the writing of the NR at all, and thus, could not even be brought before the administration in anything other than an informal complaint.

Furthermore, 7 C.F.R. § 1.130 *et seq.* (2005) provides no relief to petitioner or other regulated entities. The plain language of section 1.133(b)(1) cited by the court states "[i]f there is reason to believe that a person has violated or is violating any provision of [*inter alia, the FMIA*] *or of any regulation, standard, instruction or order issued pursuant thereto* . . . a complaint may be filed with the Hearing Clerk. . . . " 7 C.F.R. § 1.133(b)(1) (emphasis added); *see also*, Pet. App. 73a n. 4. Contrary to the holding of the Eighth Circuit, petitioner has no basis for filing a complaint based upon its belief that "a person" has violated its *constitutional* rights. Again, the Eighth Circuit narrowly, and erroneously, interpreted the complaint filed herein as challenging only the issuance of several NRs. It completely ignored the fact that petitioner's complaint more broadly alleged that the NRs were independent evidence of the individual animus toward petitioner and the desire for self-promotion and benefit on the part of the respondents.

Finally, the issue of the applicability of 7 U.S.C. § 6912(e) was addressed by the district court in response to a different theory of dismissal advanced by respondents – exhaustion of administrative remedies. To the extent the issue of exhaustion was decided by the Eighth Circuit, it

was without the jurisdiction to do so on interlocutory appeal. Indeed, the respondents did not even advance such an argument to the Eighth Circuit. Nonetheless, even if the Eighth Circuit relies upon that statutory section as grounds for precluding a *Bivens* remedy doing so ignores the exceptions to statutory exhaustion requirements and departs from other jurisdictions which have not precluded a *Bivens* action against USDA employees despite the existence of section 6912(e). *See generally*, *Krusinski v. USDA*, 4 F.3d 994 (Table), 1993 WL 346858 (6th Cir. 1993) (unpublished), Pet. App. 78a-88a; *Love v. U.S.*, 915 F.2d 1242 (9th Cir. 1989); *Sheehy v. Wehlage*, 2004 WL 951367 (W.D.N.Y. Feb. 3, 2004) (plaintiff dairy farmers allowed to bring *Bivens* case against USDA employees); *Veal Connection Corp. v. Thompson*, Docket C 96-04486 CW, Pet. App. 89a-145a. Furthermore, other jurisdictions have expressly held that exhaustion under 6912(e) may not be required in all instances. *See McBride Cotton and Cattle Corp. v. Veneman*, 290 F.3d 973, 976 (9th Cir. 2002) (holding that the exhaustion requirement of 6912(e) is not jurisdictional and that exhaustion is excused because the plaintiff's complaint alleges collateral, colorable constitutional claims and attempting to exhaust those claims would be futile.)

Indeed, numerous cases have held that where a *Bivens* plaintiff seeks only money damages which are not available through the administrative process, exhaustion is not required despite its statutory mandate. For example, in *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997), the Tenth Circuit held that a prisoner seeking only money damages against individual prison personnel under *Bivens* was not required to exhaust his administrative remedies despite a statutory mandate set forth in the Prison Litigation

Reform Act ("PLRA"). In *Garrett*, the government conceded that a claim for money damages brought administratively would be rejected as constituting improper subject matter jurisdiction for administrative review and the inmate would be referred to the Federal Tort Claims Act ("FTCA"). *Garrett*, 127 F.3d at 1266.

The Tenth Circuit held that "while FTCA allows claims against the government, a prisoner may not assert personal liability against a prison official for violations of the prisoner's constitutional rights under FTCA." *Garrett* at 1266, *see also*, *Carlson v. Green*, 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468 (1980) (Congress did not intend to pre-empt a *Bivens* remedy when it enacted the FTCA). Therefore, "until an administrative remedy is provided for *Bivens* claims for money damages, we must conclude that no exhaustion of administrative remedies is required . . . because no such remedies exist to be exhausted." *Garrett* at 1267; *see also*, *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999); *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998); *Jackson v. DeTella*, 998 F.Supp. 901, (N.D. Ill. 1998); *Lacey v. C.S.P. Solano Medical Staff*, 990 F.Supp. 1199 (E.D.Cal. 1997). As in *Garrett*, here there is simply no administrative remedy under the FMIA or the applicable sections of the Code of Federal Regulations available to petitioner for the award of money damages resulting from constitutional violations which caused calculable damage to petitioner.

Similar to the prisoner cases cited above, the court in *Judicial Watch, Inc. v. Rossotti*, 217 F.Supp.2d 618 (D.Md. 2002), held that a *Bivens* action could be maintained against individual officials of the Internal Revenue Service ("IRS") despite the existence of an administrative appeals process. The court distinguished cases in which the harm

caused by the alleged constitutional violations amounted to the illegal assessment or collection of taxes which could be cured by refund suits and other similar statutory remedies, and thus, were not appropriate for *Bivens* relief. *Judicial Watch*, 217 F.Supp.2d at 625. Conversely, "where the constitutional violation is a harm in itself, such as the suppression of political speech or the violation of Fourth Amendment rights, courts have recognized the propriety of a *Bivens* remedy." *Id. citing, Nat'l Commodity and Barter Assoc. v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989) (permitting *Bivens* action for violations of the First and Fourth Amendments because "certain values . . . may be superior to the need to protect the integrity of the internal revenue system"); *Western Center for Journalism v. Cederquist*, 235 F.3d 1153 (9th Cir. 2000) (Reinhardt, J., concurring) (observing that a *Bivens* remedy is appropriate for retaliatory audits because Congress has fashioned no remedy for IRS conduct that punishes political speech); *Hurt v. United States*, 889 F.Supp. 248 (S.D.W.Va. 1995) (stating "[p]laintiffs allege a pattern of retaliatory and harassing auditing and crediting practices used by the IRS against them. This is sufficient to withstand a motion to dismiss the *Bivens* claim.").

Ultimately, the *Judicial Watch* court stated that a "*Bivens* action should be available where, as here, the statutory remedies provided in the Internal Revenue Code . . . would not address the alleged constitutional wrongs of the I.R.S. defendants." *Judicial Watch*, 217 F.Supp.2d at 625. Again, under the administrative scheme available to petitioner, there exists no remedy for constitutional violations. Therefore, petitioner is not required to exhaust any administrative remedies. *See Garrett* at 1267.

CONCLUSION

For the foregoing reasons the petition for writ should be granted and petitioner respectfully asks this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-1918

Nebraska Beef, Ltd.,	*	
Plaintiff/Appellee,	*	
v.	*	
Dennis Greening; Donald [sic] Seitz; Chander Dev; Duane Shonka; Michael Fast,	*	Appeal from the United States District Court for the District of Nebraska.
Defendants/Appellants,	*	
John Doe, 1, Other FSIS Employees; Jane Doe, 1, Other FSIS Employees; John Doe, 2, Other FSIS Employees; Jane Doe, 2, Other FSIS Employees,	*	
Defendants.	*	

Submitted: December 16, 2004
Filed: February 28, 2005

Before WOLLMAN, MAGILL, and COLLOTON, Circuit Judges.

WOLLMAN, Circuit Judge.

Nebraska Beef, Ltd., brought a *Bivens*[1] suit against federal food safety inspectors (Inspectors) from the United States Department of Agriculture (USDA) based on actions taken by the Inspectors pursuant to the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 601 *et. seq.* The Inspectors appeal from the district court's denial of their motion to dismiss on the basis of qualified immunity. Because a *Bivens* remedy is not available to Nebraska Beef, we reverse.

I.

Pursuant to the FMIA, the USDA has promulgated a comprehensive regulatory scheme governing meat packing and processing. *See* 9 C.F.R. pt. 417. Nebraska Beef operates a packing and processing plant subject to inspection under the FMIA and its implementing regulations. On September 3, 2002, the Inspectors conducted a public health assessment of Nebraska Beef's plant and issued Noncompliance Records (NRs) for perceived regulatory violations. Following several procedural actions, Nebraska Beef and the USDA entered into a mutual consent decision to resolve the NRs. According to Nebraska Beef, the Inspectors maliciously issued fifty-eight additional NRs in contravention of the consent decision.

Nebraska Beef initiated a *Bivens* action against the Inspectors for damages to its reputation and business. The Inspectors filed a motion to dismiss on several grounds

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* allows tort actions against federal officials and employees directly under the Constitution. *See Estate of Rosenberg by Rosenberg v. Crandell*, 56 F.3d 35, 36 (8th Cir. 1995).

including qualified immunity and the nonavailability to Nebraska Beef of a *Bivens* remedy. It is from the denial of that motion that the Inspectors filed this interlocutory appeal.

II.

Nebraska Beef asserts that we lack jurisdiction to consider the availability of a *Bivens* remedy. The Supreme Court first recognized jurisdiction over an interlocutory appeal from a denial of qualified immunity in *Mitchell v. Forsyth,* 472 U.S. 511 (1985). In *Drake v. Scott,* we held that this jurisdiction encompassed the related issue of whether a complaint failed to state a claim, holding that when an interlocutory appeal of a denial of qualified immunity is properly before us, we may decide "closely related issues of law." 812 F.2d 395, 399 (8th Cir. 1987), *aff'd on reh'g,* 823 F.2d 239 (8th Cir. 1987). The defendants in *Drake* had asserted qualified immunity but had also argued that Drake's due-process claim failed as a matter of law because Drake had no property interest. *Id.* at 398. We noted that "[i]f Drake possesses no property interest, he cannot succeed on his claim, and we need not reach the immunity issue." *Id.* at 399. We observed that the property-interest question was "analytically antecedent to, and in a sense also pendent to, the qualified-immunity issue." *Id.*

Subsequent to *Drake,* the Supreme Court considered a *Bivens* claim that alleged an infringement of Fifth Amendment due-process "liberty interests" in *Siegert v. Gilley,* 500 U.S. 226, 229 (1991). The Supreme Court instructed that:

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

Id. at 232.

The Supreme Court revisited the jurisdictional limits of an interlocutory appeal from a denial of qualified immunity in *Johnson v. Jones,* 515 U.S. 304 (1995). The Court examined whether appellate courts had jurisdiction to consider pretrial "evidence insufficiency" claims in an interlocutory appeal from the denial of qualified immunity. *Id.* at 308. The Court stressed that the issue on appeal concerned "a *fact*-related dispute" as to whether the pretrial record contained evidence sufficient to show a genuine issue of fact for trial. *Id.* at 307 (original emphasis). The Court cautioned against expansive jurisdiction, observing that an interlocutory appeal "can threaten [district court] proceedings with delay, adding costs and diminishing coherence" and that such an appeal "risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Id.*

at 309. The Court concluded that a question involving only evidence sufficiency, i.e., which facts a party may be able to prove at trial, is not appealable. *Id.* at 313.

The following year, in *Behrens v. Pelletier*, the Court restated its holding in *Johnson*, observing that: "summary judgment determinations *are* appealable when they resolve a dispute concerning an abstract issue of law relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly' established." 516 U.S. 299, 313 (1996) (internal citations and quotations omitted) (original emphasis).

The question before us, then, is whether, in light of *Siegert, Johnson*, and *Behrens*, the availability of a *Bivens* remedy is an issue of law that is "closely related" to or "inextricably intertwined" with the denial of qualified immunity.[2] Although the lack of a *Bivens* remedy would not entitle the defendants to qualified immunity,[3] the issue is "analytically antecedent to, and in a sense also pendent to, the qualified immunity issue." *Drake*, 812 F.2d at 399. It is a purely legal question that presents none of the

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[2] In *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394-95 (8th Cir. 1995), we equated our "closely related" definition to the "inextricably intertwined" language used in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). *Cf. Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 n. 2 (8th Cir. 2004).

[3] We note that dictum in *Buchholz v. Aldaya* 210 F.3d 862 (8th Cir. 2000) suggests otherwise. We stated in *Buchholz*, citing *Drake*, that "[i]f defendants prevail on [establishing that Buchholz has no cause of action], 'it follows a fortiori' they are entitled to qualified immunity." *Id.* at 865. This assertion, which had no effect on the holding in *Buchholz*, does not inexorably flow from our holding in *Drake*. Concluding that a *Bivens* action is unavailable precludes the need to decide whether the defendants are entitled to qualified immunity; it does not entitle them to qualified immunity.

judicial economy concerns addressed in *Johnson*. In fact, common sense tells us that addressing this potentially dispositive legal question serves the interests of judicial economy. If we remanded to the district court and the plaintiffs prevailed at trial, we would likely see the same appeal again, after the cost and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception. Accordingly, we conclude that we have jurisdiction to consider the availability of a *Bivens* remedy. *See Moreno v. Small Bus. Admin.*, 877 F.2d 715, 716 (8th Cir. 1989) (question of qualified immunity on interlocutory appeal is moot when *Bivens* action is precluded by comprehensive regulatory scheme); *see also Hill v. Dep't of the Air Force*, 884 F.2d 1318, 1320 (10th Cir. 1989) (deciding interlocutory appeal based on lack of *Bivens* remedy and not reaching issue of qualified immunity); *cf. Merritt v. Shuttle, Inc.*, 187 F.3d 263, 268-69 (2d Cir. 1999) (resolving predicate issue of subject matter jurisdiction is "necessary to ensure meaningful review of" denial of qualified immunity). *But see Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n. 2 (7th Cir. 1993) (refusing to extend pendent jurisdiction to "collateral" legal issues of standing unrelated to qualified immunity and finding no "'compelling reasons' for not deferring the limitations questions until the end of the lawsuit"); *Kwai Fun Wong v. United States*, 373 F.3d 952, 961 (9th Cir. 2004) (stating that resolving the availability of a *Bivens* remedy "is not a logical predicate to the resolution of . . . the qualified immunity issue").

III.

The Supreme Court has been wary of extending *Bivens* remedies into new contexts, *Schweiker v. Chilicky*,

487 U.S. 412, 421 (1988), and has not created additional *Bivens* remedies "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Id.* at 423. We have noted that this is the case even when the administrative remedy does not provide complete relief. *Sinclair v. Hawke,* 314 F.3d 934, 940 (8th Cir. 2003).

There is a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees," and "[i]f Congress has not explicitly created such a right of action, and if it has created other remedies to vindicate (though less completely) the particular rights being asserted in a given case, the chances are that the courts will leave the parties to the remedies Congress has expressly created for them." *McIntosh v. Turner,* 861 F.2d 524, 526 (8th Cir. 1988). When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the APA is sufficient to preclude a *Bivens* action. *Sinclair,* 314 F.3d at 940. Parties may not avoid administrative review simply by fashioning their attack on an agency decision as a constitutional tort claim against individual agency officers. *Id.*

Three factors counsel against extending a *Bivens* remedy to an action brought against the Inspectors. First, Congress has not explicitly created any direct right of action against USDA employees alleged to have committed constitutional violations. Second, the USDA has promulgated a comprehensive regulatory scheme pursuant to the

FMIA that includes the right to judicial review under the APA.[4] Finally, Congress has created a stringent exhaustion requirement for grievances filed against USDA employees, *see* 7 U.S.C. § 6912(e), which further evidences its intent to have grievances aired to and addressed by the agency prior to our review.

Given the above factors, as well as the Supreme Court's caution against extending *Bivens* remedies to new contexts, we conclude that such a remedy is not available to Nebraska Beef. *Cf. Sinclair,* 314 F.3d at 942-43 (observing that personal liability for bank regulators in the "complex regulatory environment" of the banking industry is for Congress to decide). Because we resolve the instant case on the lack of a *Bivens* remedy, we do not reach the issue of qualified immunity. We reverse the district court's denial of the Inspector's motion to dismiss and remand with an order to dismiss the complaint for failure to state a claim upon which relief can be granted.

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[4] These procedures include provisions for an administrative appeal from an adverse decision by a USDA inspector. *See* 9 C.F.R. §§ 500.2(c) and 500.5 (2005). The Secretary of Agriculture has also promulgated "Uniform Rules of Practice" which establish procedures for making an appeal to the agency. *See* 7 C.F.R. § 1.130 *et. seq.* (2005). Under those regulations, an aggrieved party may file a complaint if there "is reason to believe that a person has violated or is violating any provision of [*inter alia,* the FMIA] or of any regulation, standard, instruction or order issued pursuant thereto." *Id.* at § 1.133(b)(1). A final order by the USDA's Judicial Officer is subject to judicial review. *Id.* at § 1.145(i).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NEBRASKA BEEF, LTD., Plaintiff, v. DENNIS GREENING, RONALD SEITZ, CHANDER DEV, DUANE SHONKA, MICHAEL FAST, OTHER FSIS EMPLOYEES, JOHN DOE 1, JOHN DOE 2, JANE DOE 1, and JANE DOE 2, Defendants.	)	8:03CV175 MEMORANDUM AND ORDER

Introduction

This matter is before the court on defendants' motion to dismiss, Filing No. 16, pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Plaintiff brings this action alleging that defendants, in their individual capacities, have engaged in unfair, arbitrary, and capricious conduct against it in violation of the United States Constitution. Plaintiff alleges that defendants violated its due process rights and acted in contravention of its statutory authority. Defendants argue that this court is without jurisdiction to decide these claims, contending that plaintiff lacks standing, has failed to exhaust administrative remedies, and has failed to adequately plead both the *Bivens* action and the conspiracy claim. Defendants further allege they have qualified immunity from suit. I have carefully reviewed the record, indices of evidence, briefs in support and in opposition, and the relevant case and administrative law, and I conclude the motion to dismiss should be denied at

this time. I have entered an order concurrently with this Order in the related case of *United States v. USDA*, 03CV174 (D.Neb. March 18, 2004) (Memorandum and Order on motion to dismiss). The facts, procedural history and the issues of standing, exhaustion and due process are identical in most respects. To that extent, I have included the same analysis in both opinions. To the extent that claims overlap, my findings will be applicable in both cases.

Facts/Procedural History

On January 14, 2003, plaintiff filed a complaint in this court asking for a temporary restraining order against the United States Department of Agriculture (USDA), as the USDA was considering suspending its inspection services at plaintiff's beef processing plant. *Nebraska Beef v. USDA*, 03CV16 (D.Neb.2003). A temporary restraining order (TRO) was granted. *Id.*, Filing No. 2. Prior to the hearing on the preliminary injunction, the Food Safety and Inspection Service (FSIS) filed an administrative complaint against the plaintiff with an administrative law judge (ALJ) with the USDA. The parties thereafter mutually agreed to enter into a Consent Decision and Order and to dismiss the case before me with prejudice and for termination of the TRO. The Consent Decision and Order required plaintiff to comply with statutory law and federal regulations and required withdrawal of the inspectors to be held in abeyance.

Subsequent to the Consent Decision, plaintiff has filed two lawsuits in this court. The one before me in this lawsuit is against various officials who work for the USDA; the second lawsuit has been filed against the

USDA. *Nebraska Beef v. USDA,* 03CV174 (D.Neb. May 2, 2003). Plaintiff alleges that since the Consent Decision, inspection personnel issued fifty-eight noncompliance reports (NRs). These reports have been issued over a three-month period of time. Plaintiff contends that these NRs were improperly issued, unfair and biased, and in violation of the law. Plaintiff cites numerous instances where it believes the defendants improperly issued these NRs. Further, plaintiff alleges that not once has there been a food safety issue present. The defendants allege qualified immunity; lack of exhaustion; lack of standing; and lack of a due process violation. In the related case, *Nebraska Beef v. USDA,* 03CV174, the same standing, ripeness, due process and exhaustion claims are raised, and plaintiff also alleges a breach of contract claim. To the extent that claims overlap, my findings will be applicable to both cases.

Standard of Review

12(b)(1)

Because jurisdiction is a threshold issue for the court, the district court has broader power to decide its own right to hear the case than it has when the merits of the case are reached. *Bellecourt v. United States,* 994 F.2d 427, 430 (8th Cir.1993). For the court to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the complaint must be successfully challenged either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir.1993). In a facial challenge to jurisdiction, all of the factual allegations regarding jurisdiction would be presumed true and the motion could succeed only if the plaintiff had failed to allege an element necessary for

subject matter jurisdiction. *Id.* In a factual attack on the jurisdictional allegations of the complaint, however, the court can consider competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute. *Id.* Because the parties have submitted some evidence in support of their respective positions, this case presents a factual jurisdictional challenge. In such a challenge, this court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn v. United States,* 918 F.2d 724, 729 (8th Cir. 1990). No presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the court from evaluating for itself the merits of jurisdictional claims. *Id.* The plaintiff has the burden of proving that jurisdiction does in fact exist. *Id.* at 730.

12(b)(6)

In considering a motion to dismiss a complaint under Rule 12(b)(6), the court must assume all the facts alleged in the complaint are true, and must liberally construe the complaint in the light most favorable to the plaintiff. *Schmeddir[illegible] v. Tnemec* Co., 187 F.3d 862, 864 (8th Cir. 1999). A Rule 12(b)(6) motion to dismiss a complaint should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Id.* Thus, as a practical matter, a dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Id.*

Discussion

A. Exhaustion

A plaintiff must exhaust administrative remedies in order for a court to have subject matter jurisdiction. *United States v. Dico, Inc.*, 136 F.3d 572, 575 (8th Cir. 1998); 7 U.S.C. § 6912(e). Generally, failure to exhaust administrative remedies will preclude one from seeking relief in federal court. *See Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). Exhaustion is required in order to prevent premature interference with agency processes, to permit the agency to function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. *In Home Health, Inc. v. Shalala*, 272 F.3d 554, 559-60 (8th Cir. 2001); *United States v. Dico, Inc.*, 136 F.3d at 576. The relevant statute in this case requires exhaustion of all administrative appeal procedures before one can sue the Secretary of Agriculture or officers or employees. 7 U.S.C. § 6912(e). Defendants contend that fifty-three of the fifty-eight NRs are being administratively appealed, and at least one has been found to be in the plaintiff's favor. The USDA argues that such failure to exhaust all claims requires dismissal of the lawsuit at this time.

Plaintiff argues that there are three exceptions to a statutory exhaustion requirement. *Calhoun v. USDA*, 920 F. Supp. 696, 700 (N.D.Miss. 1996). These exceptions include: (1) raising a constitutional challenge collateral to the substantive claim, *see Bowen v. City of New York*, 476 U.S. 467, 483 (1986); (2) alleging that the administrative system itself is unlawful; and (3) inadequacy of the administrative remedies, *see DCP Farms v. Yeutter*, 957 F.2d

1183 (5th Cir. 1992) (discussion of exceptions two and three). With regard to the first exception, plaintiff asserts that exhaustion is not required where a party poses a constitutional challenge to the administrative procedure. *Bowen,* 476 U.S. at 483; *In Home Health,* 272 F.3d at 559-60. In the case before me, plaintiff argues that defendants have violated its due process rights. With regard to the second exception, plaintiff argues that the USDA is acting outside the power it has received by Congress by the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 601. Plaintiff contends that the Hazardous Analysis and Critical Control Point (HACCP) and the Sanitation Standard Operating Procedures (SSOP) are in violation of the statutory authority granted to the USDA by Congress. Plaintiff challenges the administrative process as unconstitutional.

It is true that plaintiff has commenced, but has not completed, administrative appeals in this case. If plaintiff were merely complaining about whether these violations should have been written, I would agree with defendants that the exhaustion doctrine applies. The scheme set forth by Congress clearly requires exhaustion of such disagreements. However, plaintiff's complaint, unequivocally alleges constitutional claims of due process violations, retaliation, conspiracy between and among the defendants, equal protection and free speech violations, as well as arbitrary and capricious behavior on the part of defendants. These claims do not need to be exhausted and are subject to court intervention. Consequently, I conclude that while plaintiff should continue to exhaust its administrative remedies on the merits of the administrative claims, these claims that involve the constitution and

statutory authority of the defendants do not require exhaustion.

B. Standing

The burden is on plaintiff to show that it has standing to sue. *Lugan v. Defenders of Wildlife,* 504 U.S. 737, 750 (1984). To establish standing, plaintiff has the burden of showing that it has sustained or will sustain immediate damage or injury. *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983). Damage to reputation can be sufficient to confer standing on a party. *Southern Mutual Help Ass'n, Inc. v. Califano,* 574 F.2d 518, 524 (D.C.Cir. 1977). Defendants argue that plaintiff has no standing to bring this action. Defendants argue that there is no injury in fact, because the appeal process has not yet been completed. Plaintiff argues that it has standing because the defendants have violated its due process rights, have exceeded statutory authority by creating the requirement that plaintiff maintain HACCP and SSOP plans, and has issued fifty-eight NRs that are published to anyone obtaining information through the Freedom of Information Act. Plaintiff further argues that when the NRs become public records, it hurts plaintiff's reputation and business. I agree. I have already determined that plaintiff can bring the causes of action concerning the statutory and constitutional claims. Plaintiff has alleged sufficient injury so as to have standing in this case.

C. *Bivens* Claim

Plaintiff has brought a *Bivens* claim alleging that defendants have committed constitutional torts against it. *Bivens v. Six Unknown Named Agents of Federal Bureau*

of Narcotics, 403 U.S. 388 (1971). *Bivens* allows for a cause of action for damages against federal officials who violate a person's constitutional rights. *Id.* 397. *Bivens* actions have not been allowed where Congress has provided adequate remedial measures. *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988). However, *Bivens* is "a powerful tool against such governmental abuse, and must be available in appropriate cases." *Western Center for Journalism v. Cederquist,* 235 F.3d 1153, 1159 (9th Cir. 2000) (concurring opinion). Defendants contend that there is an adequate remedy through the administrative scheme which is comprehensive, allows for numerous appeals and is designed to address issues such as those complained of by the plaintiff. *See* 7 U.S.C. § 6912(e).

Further, argue defendants, there is no cognizable constitutional tort against them. The plaintiff must plead the personal involvement of each defendant and not rely only on the supervisory roles of any of the defendants. *Buford v. Runyon,* 160 F.3d 1199, 1203 n. 7 (8th Cir. 1999). Defendants also argue that plaintiff has not alleged a sufficient property interest to allow them to proceed with the due process and equal protection claims. Issuance of the NRs, argues defendants, did not deprive plaintiff of any property interest, and again, plaintiff had adequate remedial avenues it could pursue. *See Zephyr Aviation v. Dailey,* 247 F.3d 565, 574 (5th Cir. 2001) (no procedural due process violation where adequate post-deprivation remedy exists). As for the speech and redress of grievance claims, defendants contend that plaintiff alleges conclusory claims that cannot withstand a motion to dismiss.

Plaintiff contends that there are no adequate remedies in the administrative scheme to compensate it for the damages incurred. There is no adequate remedy in the

administrative scheme for a constitutional wrong, argues plaintiff, particularly where there is abuse of power, overreaching and oppression. With regard to the due process and equal protection claims, plaintiff argues that the retention of the beef carcasses is one example of damage it sustained; that unconstitutional interference has occurred because the Act gives certain powers to the USDA which do not include HAACP and SSOP requirements yet can close down businesses; that the arbitrary decisions of the defendants erect unfair barriers and allows unequal treatment and prohibit unfair competition. With regard to the speech and grievances deprivations, plaintiff argues that it will prove a pattern of retaliation on the part of the defendants that occurred because plaintiff appealed the NRs, filed a lawsuit, and supported certain officials who filed discrimination actions against the USDA.

Plaintiff has a right to operate its business free from unconstitutional interference. In a recent [sic], a California court heard a case wherein the plaintiff, a meat packing plant and its owners, was subject to inspection by the FSIS. Plaintiffs sued various USDA employees and alleged that these federal officials retaliated against them because of their complaints about the FSIS's actions in issuing unfair process deficiency reports and for withholding inspections. *The Veal Connection Corp. v. Thompson,* CV96-4486 and CV02-4609 (N.D.Cal. February 3, 2004). As noted in *Veal Connection,* taking legitimate enforcement action with the intent to reinstate because a party exercised its First Amendment Rights is not constitutional. *Veal Connection,* No. 96-4486, p. 5. The burden is on the defendants to show they would have acted in the same manner in the absence of the protected conduct. *Soranno's*

Gasco Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). I conclude that plaintiff's complaint details sufficient actions with dates and locations and names of defendants known to have violated constitutional rights. Motives have also been alleged, and even though defendants Greening, Seitz, and Dev are supervisors, allegations beyond these supervisory roles have been stated.

D. Qualified Immunity

Federal officials are immune from suit if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity protects officials from suit except when they knowingly violate the constitution. *Malley v. Briggs,* 475 U.S. 335 (1986). The defendants must have violated a constitutional right, and that constitutional right must have been clearly established. *Ware v. Morrison,* 276 F.3d 385, 387 (8th Cir.2002).

Defendants argue that there is no violation of a clearly established constitutional right, and therefore, they are entitled to qualified immunity from suit. Defendants contend that they were just doing their job and that their conduct in all instances was reasonable. Plaintiff disagrees, arguing that the due process and equal protection violations were intentional on the part of the defendants, therefore taking them out of the protection of qualified immunity. Plaintiff argues that it had a known constitutional right that is established by law and thus defendants' violation is not protected. Because I have already concluded that plaintiff has stated constitutional and statutory claims against the defendants herein, I

likewise conclude that these claims are sufficient to take the defendants out of the protection of qualified immunity. Qualified immunity does not provide a shield for regulatory actions taken for an unlawful purpose. *Veal Connection Corp.,* No. 96-4486, p. 5.

E. Conspiracy

Defendants argue that plaintiff must plead specific facts to support this claim, as the allegations cannot be conclusory in nature. *Nelson v. City of McGehee,* 876 F.2d 56, 59 (8th Cir. 1989). "[T]he complaint must contain facts which state a claim as a matter of law and must not be conclusory." *Frey v. City of Herculaneum,* 44 F.3d 667 (8th Cir. 1995). However, plaintiff need not show that it will win at trial at this point in the lawsuit. *Hafley v. Lohman,* 90 F.3d 264, 267 (8th Cir. 1996). Plaintiff has pled sufficient facts of retaliation, conspiracy, personal desire to gain promotions and overtime, and arbitrary and capricious enforcement of federal regulations, to meet its burden in a motion to dismiss claim. *See, The Veal Connection Corp,* No. 96-4486, p. 6.

I urge the parties to continue to pursue the administrative processes available to them in this case with the hope that settlement will occur. The USDA must act in good faith and deal fairly with the plaintiff, and yet the plaintiff must comply with the legal requirements applicable to it.

THEREFORE, IT IS ORDERED that defendants' motion to dismiss, Filing No. 16, is denied.

DATED this 18th day of March, 2004.

BY THE COURT:

/s/ **Joseph F. Bataillon**
United States District Judge

FEDERAL MEAT INSPECTION ACT

21 U.S.C. § 601. Definitions

As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(a) The term "Secretary" means the Secretary of Agriculture of the United States or his delegate.

(b) The term "firm" means any partnership, association, or other unincorporated business organization.

(c) The term "meat broker" means any person, firm, or corporation engaged in the business of buying or selling carcasses, parts of carcasses, meat, or meat food products of cattle, sheep, swine, goats, horses, mules, or other equines on commission, or otherwise negotiating purchases or sales of such articles other than for his own account or as an employee of another person, firm, or corporation.

(d) The term "renderer" means any person, firm, or corporation engaged in the business of rendering carcasses or parts or products of the carcasses, of cattle, sheep, swine, goats, horses, mules, or other equines, except rendering conducted under inspection or exemption under Title I of this Act [21 U.S.C.A. §§ 601 et seq.].

(e) The term "animal food manufacturer" means any person, firm, or corporation engaged in the business of manufacturing or processing animal food derived wholly or in part from carcasses, or parts or products of the carcasses, of cattle, sheep, swine, goats, horses, mules, or other equines.

(f) The term "State" means any State of the United States and the Commonwealth of Puerto Rico.

(g) The term "Territory" means Guam, the Virgin Islands of the United States, American Samoa, and any other territory or possession of the United States, excluding the Canal Zone.

(h) The term "commerce" means commerce between any State, any Territory, or the District of Columbia, and any place outside thereof; or within any Territory not organized with a legislative body, or the District of Columbia.

(i) The term "United States" means the States, the District of Columbia, and the Territories of the United States.

(j) The term "meat food product" means any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats, excepting products which contain meat or other portions of such carcasses only in a relatively small proportion or historically have not been considered by consumers as products of the meat food industry, and which are exempted from definition as a meat food product by the Secretary under such conditions as he may prescribe to assure that the meat or other portions of such carcasses contained in such product are not adulterated and that such products are not represented as meat food products. This term as applied to food products of equines shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, and goats.

(k) The term "capable of use as human food" shall apply to any carcass, or part or product of a carcass, of any animal, unless it is denatured or otherwise identified as required by regulations prescribed by the Secretary to

deter its use as human food, or it is naturally inedible by humans.

(l) The term "prepared" means slaughtered, canned, salted, rendered, boned, cut up, or otherwise manufactured or processed.

(m) The term "adulterated" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;

(2)(A) if it bears or contains (by reason of administration of any substance to the live animal or otherwise) any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive) which may, in the judgment of the Secretary, make such article unfit for human food,

(B) if it is, in whole or in part, a raw agricultural commodity and such commodity bears or contains a pesticide chemical which is unsafe within the meaning of section 346a of this title,

(C) if it bears or contains any food additive which is unsafe within the meaning of section 348 of this title,

(D) if it bears or contains any color additive which is unsafe within the meaning of section 379e of this title: *Provided*, That an article which is not adulterated under

clause (B), (C), or (D) shall nevertheless be deemed adulterated if use of the pesticide chemical, food additive, or color additive in or on such article is prohibited by regulations of the Secretary in establishments at which inspection is maintained under this subchapter;

(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

(4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

(5) if it is, in whole or in part, the product of an animal which has died otherwise than by slaughter;

(6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

(7) if it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 348 of this title;

(8) if any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is; or

(9) if it is margarine containing animal fat and any of the raw material used therein consisted in whole or in part of any filthy, putrid, or decomposed substance.

(n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular;

(2) if it is offered for sale under the name of another food;

(3) if it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated;

(4) if its container is so made, formed, or filled as to be misleading;

(5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary;

(6) if any word, statement, or other information required by or under authority of this chapter to appear on the label or other labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such

terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

(7) if it purports to be or is represented as a food for which a definition and standard of identity or composition has been prescribed by regulations of the Secretary under section 607 of this title unless (A) it conforms to such definition and standard, and (B) its label bears the name of the food specified in the definition and standard and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food;

(8) if it purports to be or is represented as a food for which a standard or standards of fill of container have been prescribed by regulations of the Secretary under section 607 of this title, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;

(9) if it is not subject to the provisions of subparagraph (7), unless its label bears (A) the common or usual name of the food, if any there be, and (B) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings may, when authorized by the Secretary, be designated as spices, flavorings, and colorings without naming each: *Provided*, That to the extent that compliance with the requirements of clause (B) of this subparagraph (9) is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Secretary;

(10) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Secretary, after consultation with the Secretary of Health and Human Services, determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses;

(11) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact: *Provided*, That, to the extent that compliance with the requirements of this subparagraph (11) is impracticable, exemptions shall be established by regulations promulgated by the Secretary; or

(12) If it fails to bear, directly thereon or on its container, as the Secretary may by regulations prescribe, the inspection legend and, unrestricted by any of the foregoing, such other information as the Secretary may require in such regulations to assure that it will not have false or misleading labeling and that the public will be informed of the manner of handling required to maintain the article in a wholesome condition.

(o) The term "label" means a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article.

(p) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(q) The term "Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.]" means the Act so entitled,

approved June 25, 1938 (52 Stat. 1040) [21 U.S.C.A. § 301 et seq.], and Acts amendatory thereof or supplementary thereto.

(r) The terms "pesticide chemical," "food additive," "color additive," and "raw agricultural commodity" shall have the same meanings for purposes of this chapter as under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.].

(s) The term "official mark" means the official inspection legend or any other symbol prescribed by regulations of the Secretary to identify the status of any article or animal under this chapter.

(t) The term "official inspection legend" means any symbol prescribed by regulations of the Secretary showing that an article was inspected and passed in accordance with this chapter.

(u) The term "official certificate" means any certificate prescribed by regulations of the Secretary for issuance by an inspector or other person performing official functions under this chapter.

(v) The term "official device" means any device prescribed or authorized by the Secretary for use in applying any official mark.

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21 U.S.C. § 602. Congressional statement of findings

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food

products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

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21 U.S.C. § 603. Inspection of meat and meat food products

(a) Examination of animals before slaughtering; diseased animals slaughtered separately and carcasses examined

For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed

for that purpose, an examination and inspection of all cattle, sheep, swine, goats, horses, mules, and other equines before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all cattle, sheep, swine, goats, horses, mules, and other equines found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, goats, horses, mules, or other equines, and when so slaughtered the carcasses of said cattle, sheep, swine, goats, horses, mules, or other equines shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter.

(b) Humane methods of slaughter

For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which cattle, sheep, swine, goats, horses, mules, and other equines are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter. The Secretary may refuse to provide inspection to a new slaughtering establishment or may cause inspection to be temporarily suspended at a slaughtering establishment if the Secretary finds that any cattle, sheep, swine, goats, horses, mules, or other equines have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906) until the establishment furnishes assurances satisfactory to the

Secretary that all slaughtering and handling in connection with slaughter of livestock shall be in accordance with such a method.

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21 U.S.C. § 604. Post mortem examination of carcasses and marking or labeling; destruction of carcasses condemned; reinspection

For the purposes hereinbefore set forth the Secretary shall cause to be made by inspectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, goats, horses, mules, and other equines to be prepared at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia as articles of commerce which are capable of use as human food; and the carcasses and parts thereof of all such animals found to be not adulterated shall be marked, stamped, tagged, or labeled as "Inspected and passed"; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all carcasses and parts thereof of animals found to be adulterated; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become adulterated, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be adulterated, it shall be

destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

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21 U.S.C. § 605. Examination of carcasses brought into slaughtering or packing establishments, and of meat food products issued from and returned thereto; conditions for entry

The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, goats, horses, mules, and other equines or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products, which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained. The Secretary may limit the entry of carcasses, parts of carcasses, meat and meat food products, and other materials into any establishment at which inspection under this title [21 U.S.C.A. §§ 601 et seq.] is maintained, under such conditions as he may prescribe to assure that allowing the entry of such articles into such inspected establishments will be consistent with the purposes of this chapter.

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21 U.S.C. § 606. Inspectors of meat food products; marks of inspection; destruction of condemned products; products for export

For the purposes hereinbefore set forth the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be not adulterated; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all such products found adulterated, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary may remove inspectors from any establishment which fails to so destroy such condemned meat food products: *Provided*, That subject to the rules and regulations of the Secretary the provisions of this section in regard to preservatives shall not apply to meat food products for export to any foreign country and which are prepared or packed according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article shall be in fact sold or offered for sale for domestic use or consumption then this proviso shall not exempt said article from the operation of all the other provisions of this chapter.

21 U.S.C. § 607. Labeling, marking, and container requirements

(a) Labeling receptacles or coverings of meat or meat food products inspected and passed; supervision by inspectors

When any meat or meat food product prepared for commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this chapter is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of this chapter; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this chapter is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector.

(b) Information on articles or containers; legible form

All carcasses, parts of carcasses, meat and meat food products inspected at any establishment under the authority of this title [21 U.S.C.A. §§ 601 et seq.] and found to be not adulterated, shall at the time they leave the establishment bear, in distinctly legible form, directly thereon or on their containers, as the Secretary may

require, the information required under paragraph (n) of section 601 of this title.

(c) Labeling: type styles and sizes; definitions and standards of identity or composition; standards of fill of container; consistency of Federal and Federal-State standards

The Secretary, whenever he determines such action is necessary for the protection of the public, may prescribe: (1) the styles and sizes of type to be used with respect to material required to be incorporated in labeling to avoid false or misleading labeling in marketing and labeling any articles or animals subject to this title [21 U.S.C.A. §§ 601 et seq.] or Title II of this Act [21 U.S.C.A. §§ 641 et seq.]; (2) definitions and standards of identity or composition for articles subject to this title [21 U.S.C.A. §§ 601 et seq.] and standards of fill of container for such articles not inconsistent with any such standards established under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], and there shall be consultation between the Secretary and the Secretary of Health and Human Services prior to the issuance of such standards under either Act relating to articles subject to this chapter to avoid inconsistency in such standards and possible impairment of the coordinated effective administration of these Acts. There shall also be consultation between the Secretary and an appropriate advisory committee provided for in section 661 of this title, prior to the issuance of such standards under this chapter, to avoid, insofar as feasible, inconsistency between Federal and State standards.

(d) Sales under false or misleading name, other marking or labeling or in containers of misleading form or size; trade names, and other marking, labeling, and containers approved by Secretary

No article subject to this title [21 U.S.C.A. §§ 601 et seq.] shall be sold or offered for sale by any person, firm, or corporation, in commerce, under any name or other marking or labeling which is false or misleading, or in any container of a misleading form or size, but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Secretary are permitted.

(e) Use withholding directive respecting false or misleading marking, labeling, or container; modification of false or misleading matter; hearing; withholding use pending proceedings; finality of Secretary's action; judicial review; application of section 194 of Title 7

If the Secretary has reason to believe that any marking or labeling or the size or form of any container in use or proposed for use with respect to any article subject to this title [21 U.S.C.A. §§ 601 et seq.] is false or misleading in any particular, he may direct that such use be withheld unless the marking, labeling, or container is modified in such manner as he may prescribe so that it will not be false or misleading. If the person, firm, or corporation using or proposing to use the marking, labeling or container does not accept the determination of the Secretary, such person, firm, or corporation may request a hearing, but the use of the marking, labeling, or container shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless, within thirty days after receipt of notice of such final determination, the person, firm, or corporation adversely affected thereby appeals to the United States court of appeals for the circuit in which such person, firm, or corporation has its principal place of business or to the United States

Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of Title 7 shall be applicable to appeals taken under this section.

(f) Lamb and mutton

The Secretary, consistent with United States international obligations, shall establish standards for the labeling of sheep carcasses, parts of sheep carcasses, sheepmeat, and sheepmeat food products.

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21 U.S.C. § 608. Sanitary inspection and regulation of slaughtering and packing establishments; rejection of adulterated meat or meat food products

The Secretary shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, goats, horses, mules and other equines are slaughtered and the meat and meat food products thereof are prepared for commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered adulterated, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped or tagged as "inspected and passed."

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21 U.S.C. § 609. Examination of animals and food products thereof, slaughtered and prepared during nighttime

The Secretary shall cause an examination and inspection of all cattle, sheep, swine, goats, horses, mules and other equines, and the food products thereof, slaughtered and prepared in the establishments hereinbefore described for the purposes of commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, goats, horses, mules, and other equines, or the preparation of said food products is conducted during the nighttime.

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21 U.S.C. § 610. Prohibited acts

No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals –

(a) Slaughtering animals or preparation of articles capable of use as human food

slaughter any such animals or prepare any such articles which are capable of use as human food at any establishment preparing any such articles for commerce, except in compliance with the requirements of this chapter;

(b) Humane methods of slaughter

slaughter or handle in connection with slaughter any such animals in any manner not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906);

(c) Sales, transportation, and other transactions

sell, transport, offer for sale or transportation, or receive for transportation, in commerce, (1) any such articles which (A) are capable of use as human food and (B) are adulterated or misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation; or (2) any articles required to be inspected under this title [21 U.S.C.A. §§ 601 et seq.] unless they have been so inspected and passed;

(d) Adulteration or misbranding

do, with respect to any such articles which are capable of use as human food, any act while they are being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded.

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21 U.S.C. § 611. Devices, marks, labels, and certificates; simulations

(a) Devices to be made under authorization of Secretary

No brand manufacturer, printer, or other person, firm, or corporation shall cast, print, lithograph, or otherwise make any device containing any official mark or simulation thereof, or any label bearing any such mark or simulation, or any form of official certificate or simulation thereof, except as authorized by the Secretary.

(b) Other misconduct

No person, firm, or corporation shall –

(1) forge any official device, mark, or certificate;

(2) without authorization from the Secretary use any official device, mark, or certificate, or simulation thereof, or alter, detach, deface, or destroy any official device, mark, or certificate;

(3) contrary to the regulations prescribed by the Secretary, fail to use, or to detach, deface, or destroy any official device, mark, or certificate;

(4) knowingly possess, without promptly notifying the Secretary or his representative, any official device or any counterfeit, simulated, forged, or improperly altered official certificate or any device or label or any carcass of any animal, or part or product thereof, bearing any counterfeit, simulated, forged, or improperly altered official mark;

(5) knowingly make any false statement in any shipper's certificate or other nonofficial or official certificate provided for in the regulations prescribed by the Secretary; or

(6) knowingly represent that any article has been inspected and passed, or exempted, under this chapter when, in fact, it has, respectively, not been so inspected and passed, or exempted.

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21 U.S.C. §§ 612 to 614. Repealed

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21 U.S.C. § 615. Inspection of carcasses, meat of which is intended for export

The Secretary shall also cause to be made a careful inspection of the carcasses and parts thereof of all cattle,

sheep, swine, goats, horses, mules, and other equines, the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise prepared, is intended and offered for export to any foreign country, at such times and places and in such manner as he may deem proper.

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21 U.S.C. § 616. Inspectors of carcasses, etc., meat of which is intended for export; certificates of condition

For the purpose of section 615 of this title the Secretary may appoint inspectors who shall be authorized to give an official certificate stating the condition in which said cattle, sheep, swine, goats, horses, mules, or other equines, and the meat thereof, are found.

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21 U.S.C. § 617. Clearance prohibited to vessel carrying meat for export without inspector's certificate

No clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef, mutton, pork, goat or equine meat for export to and sale in a foreign country from any port in the United States, until the owner or shipper thereof shall obtain from an inspector appointed under the provisions of this chapter a certificate that the said cattle, sheep, swine, goats, horses, mules, and other equines were sound and healthy at the time of inspection, and that their meat is sound and wholesome, unless the Secretary shall have waived the requirements of such certificate for the country to which said cattle, sheep, swine, goats, horses, mules, and other equines or meats are to be exported.

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21 U.S.C. § 618. Delivery of inspectors' certificates, and of copies

The inspectors provided for under this subchapter shall be authorized to give official certificates of the condition of the carcasses and products of cattle, sheep, swine, goats, horses, mules, and other equines; and one copy of every certificate granted under the provisions of this chapter shall be filed in the Department of Agriculture, another copy shall be delivered to the owner or shipper, and when the cattle, sheep, swine, goats, horses, mules, and other equines, or their carcasses and products are sent abroad, a third copy shall be delivered to the chief officer of the vessel on which the shipment shall be made.

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21 U.S.C. § 619. Marking, labeling, or other identification of kinds of animals or articles' derivation; separate establishments for preparation and slaughtering activities

No person, firm, or corporation shall sell, transport, offer for sale or transportation, or receive for transportation, in commerce, any carcasses of horses, mules, or other equines or parts of such carcasses, or the meat or meat food products thereof, unless they are plainly and conspicuously marked or labeled or otherwise identified as required by regulations prescribed by the Secretary to show the kinds of animals from which they were derived. When required by the Secretary, with respect to establishments at which inspection is maintained under this title [21 U.S.C.A. §§ 601 et seq.], such animals and their carcasses, parts thereof, meat and meat food products shall be prepared in establishments separate from those in which cattle, sheep, swine, or goats are slaughtered or their carcasses, parts thereof, meat or meat food products are prepared.

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21 U.S.C. § 620. Imports

(a) Adulteration or misbranding prohibition; compliance with inspection, building construction standards, and other provisions; humane methods of slaughter; treatment as domestic articles subject to this chapter and food, drug, and cosmetic provisions; marking and labeling; personal consumption exemption

No carcasses, parts of carcasses, meat or meat food products of cattle, sheep, swine, goats, horses, mules, or other equines which are capable of use as human food, shall be imported into the United States if such articles are adulterated or misbranded and unless they comply with all the inspection, building construction standards, and all other provisions of this chapter and regulations issued thereunder applicable to such articles in commerce within the United States. No such carcasses, parts of carcasses, meat or meat food products shall be imported into the United States unless the livestock from which they were produced was slaughtered and handled in connection with slaughter in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906). All such imported articles shall, upon entry into the United States, be deemed and treated as domestic articles subject to the other provisions of this chapter and the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.]: *Provided*, That they shall be marked and labeled as required by such regulations for imported articles: *Provided further*, That nothing in this section shall apply to any individual who purchases meat or meat products outside the United States for his own consumption except that the total amount of such meat or meat products shall not exceed fifty pounds.

(b) Terms and conditions for destruction

The Secretary may prescribe the terms and conditions for the destruction of all such articles which are imported contrary to this section, unless (1) they are exported by the consignee within the time fixed therefor by the Secretary, or (2) in the case of articles which are not in compliance with the chapter solely because of misbranding, such articles are brought into compliance with the chapter under supervision of authorized representatives of the Secretary.

(c) Payment of storage, cartage, and labor charges by owner or consignee; liens

All charges for storage, cartage, and labor with respect to any article which is imported contrary to this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against such article and any other article thereafter imported under this chapter by or for such owner or consignee.

(d) Prohibition

The knowing importation of any article contrary to this section is prohibited.

(e) Omitted

(f) Inspection and other standards; applicability, enforcement, etc.; certifications

Notwithstanding any other provision of law, all carcasses, parts of carcasses, meat, and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, capable of use as human food, offered for importation into the United States shall be subject to the

inspection, sanitary, quality, species verification, and residue standards applied to products produced in the United States. Any such imported meat articles that do not meet such standards shall not be permitted entry into the United States. The Secretary shall enforce this provision through (1) the imposition of random inspections for such species verification and for residues, and (2) random sampling and testing of internal organs and fat of the carcasses for residues at the point of slaughter by the exporting country in accordance with methods approved by the Secretary. Each foreign country from which such meat articles are offered for importation into the United States shall obtain a certification issued by the Secretary stating that the country maintains a program using reliable analytical methods to ensure compliance with the United States standards for residues in such meat articles. No such meat article shall be permitted entry into the United States from a country for which the Secretary has not issued such certification. The Secretary shall periodically review such certifications and shall revoke any certification if the Secretary determines that the country involved is not maintaining a program that uses reliable analytical methods to ensure compliance with United States standards for residues in such meat articles. The consideration of any application for a certification under this subsection and the review of any such certification, by the Secretary, shall include the inspection of individual establishments to ensure that the inspection program of the foreign country involved is meeting such United States standards.

(g) Administration of animal drugs or antibiotics; terms and conditions; entry order violations

The Secretary may prescribe terms and conditions under which cattle, sheep, swine, goats, horses, mules, and

other equines that have been administered an animal drug or antibiotic banned for use in the United States may be imported for slaughter and human consumption. No person shall enter cattle, sheep, swine, goats, horses, mules, and other equines into the United States in violation of any order issued under this subsection by the Secretary.

(h) Reciprocal meat inspection requirement

(1) As used in this subsection:

(A) The term "meat articles" means carcasses, meat and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, that are capable of use as human food.

(B) The term "standards" means inspection, building construction, sanitary, quality, species verification, residue, and other standards that are applicable to meat articles.

(2) On request of the Committee on Agriculture or the Committee on Ways and Means of the House of Representatives or the Committee on Agriculture, Nutrition, and Forestry or the Committee on Finance of the Senate, or at the initiative of the Secretary, the Secretary shall, as soon as practicable, determine whether a particular foreign country applies standards for the importation of meat articles from the United States that are not related to public health concerns about end-product quality that can be substantiated by reliable analytical methods.

(3) If the Secretary determines that a foreign country applies standards described in paragraph (2) –

(A) the Secretary shall consult with the United States Trade Representative; and

(B) within 30 days after the determination of the Secretary under paragraph (2), the Secretary and the United States Trade Representative shall recommend to the President whether action should be taken under paragraph (4).

(4) Within 30 days after receiving a recommendation for action under paragraph (3), the President shall, if and for such time as the President considers appropriate, prohibit imports into the United States of any meat articles produced in such foreign country unless it is determined that the meat articles produced in that country meet the standards applicable to meat articles in commerce within the United States.

(5) The action authorized under paragraph (4) may be used instead of, or in addition to, any other action taken under any other law.

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21 U.S.C. § 621. Inspectors to make examinations provided for; appointment; duties; regulations

The Secretary shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, goats, horses, mules, and other equines, inspection of which is hereby provided for, and of all carcasses and parts thereof, and of all meats and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag, or label any carcass or any part thereof, or meat food product therefrom,

prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found to be not adulterated; and shall perform such other duties as are provided by this chapter and by the rules and regulations to be prescribed by said Secretary; and said Secretary shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this chapter, and all inspections and examinations made under this chapter, shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary not inconsistent with provisions of this chapter.

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21 U.S.C. § 622. Bribery of, or gifts to, inspectors or other officers and acceptance of gifts

Any person, firm, or corporation, or any agent or employee of any person, firm, or corporation, who shall give, pay, or offer, directly or indirectly, to any inspector, deputy inspector, chief inspector, or any other officer or employee of the United States authorized to perform any of the duties prescribed by this chapter or by the rules and regulations of the Secretary any money or other thing of value, with intent to influence said inspector, deputy inspector, chief inspector, or other officer or employee of the United States in the discharge of any duty provided for in this chapter, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not less than $5,000 nor more than $10,000 and by imprisonment not less than one year nor more than three years; and any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this chapter who shall accept any money, gift, or other thing of value

from any person, firm, or corporation, or officers, agents, or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm, or corporation engaged in commerce any gift, money, or other thing of value, given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than $1,000 nor more than $10,000 and by imprisonment not less than one year nor more than three years.

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21 U.S.C. § 623. Exemptions from inspection requirements

(a) Personal slaughtering and custom slaughtering for personal, household, guest, and employee uses

The provisions of this title [21 U.S.C.A. §§ 601 et seq.] requiring inspection of the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products at establishments conducting such operations for commerce shall not apply to the slaughtering by any person of animals of his own raising, and the preparation by him and transportation in commerce of the carcasses, parts thereof, meat and meat food products of such animals exclusively for use by him and members of his household and his nonpaying guests and employees; nor to the custom slaughter by any person, firm, or corporation of cattle, sheep, swine or goats delivered by the owner thereof for such slaughter, and the preparation by such slaughterer and transportation in commerce of the carcasses, parts thereof, meat and meat food products of such animals, exclusively for use, in the household of such owner, by him and members of his household and his nonpaying guests and employees; nor to the custom

preparation by any person, firm, or corporation of carcasses, parts thereof, meat or meat food products, derived from the slaughter by any person of cattle, sheep, swine, or goats of his own raising, or from game animals, delivered by the owner thereof for such custom preparation, and transportation in commerce of such custom prepared articles, exclusively for use in the household of such owner, by him and members of his household and his nonpaying guests and employees: *Provided*, That in cases where such person, firm, or corporation engages in such custom operations at an establishment at which inspection under this title [21 U.S.C.A. §§ 601 et seq.] is maintained, the Secretary may exempt from such inspection at such establishment any animals slaughtered or any meat or meat food products otherwise prepared on such custom basis: *Provided further*, That custom operations at any establishment shall be exempt from inspection requirements as provided by this section only if the establishment complies with regulations which the Secretary is hereby authorized to promulgate to assure that any carcasses, parts thereof, meat or meat food products wherever handled on a custom basis, or any containers or packages containing such articles, are separated at all times from carcasses, parts thereof, meat or meat food products prepared for sale, and that all such articles prepared on a custom basis, or any containers or packages containing such articles, are plainly marked "Not for Sale" immediately after being prepared and kept so identified until delivered to the owner and that the establishment conducting the custom operation is maintained and operated in a sanitary manner.

(b) Territorial exemption; refusal, withdrawal, or modification

The Secretary may, under such sanitary conditions as he may by regulations prescribe, exempt from the inspection requirements of this title [21 U.S.C.A. §§ 601 et seq.] the slaughter of animals, and the preparation of carcasses, parts thereof, meat and meat food products, by any person, firm, or corporation in any Territory not organized with a legislative body solely for distribution within such Territory when the Secretary determines that it is impracticable to provide such inspection within the limits of funds appropriated for administration of this chapter and that such exemption will otherwise facilitate enforcement of this chapter. The Secretary may refuse, withdraw, or modify any exemption under this subsection in his discretion whenever he determines such action is necessary to effectuate the purposes of this chapter.

(c) Pizzas containing meat food products

(1) Under such terms and conditions as the Secretary shall prescribe through rules and regulations issued under section 624 of this title that may be necessary to ensure food safety and protect public health such as special handling procedures, the Secretary shall exempt pizzas containing a meat food product from the inspection requirements of this chapter if –

(A) the meat food product components of the pizzas have been prepared, inspected, and passed in a cured or cooked form as ready-to-eat in compliance with the requirements of this chapter; and

(B) the pizzas are to be served in public or private nonprofit institutions.

(2) The Secretary may withdraw or modify any exemption under this subsection whenever the Secretary

determines such action is necessary to ensure food safety and to protect public health. The Secretary may reinstate or further modify any exemption withdrawn or modified under this subsection.

(d) Adulteration and misbranding provisions applicable to inspection-free articles

The adulteration and misbranding provisions of this title [21 U.S.C.A. §§ 601 et seq.], other than the requirement of the inspection legend, shall apply to articles which are exempted from inspection or not required to be inspected under this section.

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21 U.S.C. § 624. Storage and handling regulations; violations; exemption of establishments subject to non-Federal jurisdiction

The Secretary may by regulations prescribe conditions under which carcasses, parts of carcasses, meat, and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, capable of use as human food, shall be stored or otherwise handled by any person, firm, or corporation engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or importing, such articles, whenever the Secretary deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Violation of any such regulation is prohibited. However, such regulations shall not apply to the storage or handling of such articles at any retail store or other establishment in any State or organized Territory that would be subject to this section only because of purchases in commerce, if the storage and handling of such articles

at such establishment is regulated under the laws of the State or Territory in which such establishment is located, in a manner which the Secretary, after consultation with the appropriate advisory committee provided for in section 661 of this title, determines is adequate to effectuate the purposes of this section.

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9 C.F.R. part 417

9 C.F.R. § 417.1 Definitions.

For purposes of this part, the following definitions shall apply:

Corrective action. Procedures to be followed when a deviation occurs.

Critical control point. A point, step, or procedure in a food process at which control can be applied and, as a result, a food safety hazard can be prevented, eliminated, or reduced to acceptable levels.

Critical limit. The maximum or minimum value to which a physical, biological, or chemical hazard must be controlled at a critical control point to prevent, eliminate, or reduce to an acceptable level the occurrence of the identified food safety hazard.

Food safety hazard. Any biological, chemical, or physical property that may cause a food to be unsafe for human consumption.

HACCP System. The HACCP plan in operation, including the HACCP plan itself.

Hazard. SEE Food Safety Hazard.

Preventive measure. Physical, chemical, or other means that can be used to control an identified food safety hazard.

Process-monitoring instrument. An instrument or device used to indicate conditions during processing at a critical control point.

Responsible establishment official. The individual with overall authority on-site or a higher level official of the establishment.

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9 C.F.R. § 417.2 Hazard Analysis and HACCP Plan.

(a) Hazard analysis. (1) Every official establishment shall conduct, or have conducted for it, a hazard analysis to determine the food safety hazards reasonably likely to occur in the production process and identify the preventive measures the establishment can apply to control those hazards. The hazard analysis shall include food safety hazards that can occur before, during, and after entry into the establishment. A food safety hazard that is reasonably likely to occur is one for which a prudent establishment would establish controls because it historically has occurred, or because there is a reasonable possibility that it will occur in the particular type of product being processed, in the absence of those controls.

(2) A flow chart describing the steps of each process and product flow in the establishment shall be prepared, and the intended use or consumers of the finished product shall be identified.

(3) Food safety hazards might be expected to arise from the following:

(i) Natural toxins;

(ii) Microbiological contamination;

(iii) Chemical contamination;

(iv) Pesticides;

(v) Drug residues;

(vi) Zoonotic diseases;

(vii) Decomposition;

(viii) Parasites;

(ix) Unapproved use of direct or indirect food or color additives; and

(x) Physical hazards.

(b) The HACCP plan. (1) Every establishment shall develop and implement a written HACCP plan covering each product produced by that establishment whenever a hazard analysis reveals one or more food safety hazards that are reasonably likely to occur, based on the hazard analysis conducted in accordance with paragraph (a) of this section, including products in the following processing categories:

(i) Slaughter – all species.

(ii) Raw product – ground.

(iii) Raw product – not ground.

(iv) Thermally processed – commercially sterile.

(v) Not heat treated – shelf stable.

(vi) Heat treated – shelf stable.

(vii) Fully cooked – not shelf stable.

(viii) Heat treated but not fully cooked – not shelf stable.

(ix) Product with secondary inhibitors – not shelf stable.

(2) A single HACCP plan may encompass multiple products within a single processing category identified in this paragraph, if the food safety hazards, critical control points, critical limits, and procedures required to be identified and performed in paragraph (c) of this section are essentially the same, provided that any required features of the plan that are unique to a specific product are clearly delineated in the plan and are observed in practice.

(3) HACCP plans for thermally processed/ commercially sterile products do not have to address the food safety hazards associated with microbiological contamination if the product is produced in accordance with the requirements of part 318, subpart G, or part 381, subpart X, of this chapter.

(c) The contents of the HACCP plan. The HACCP plan shall, at a minimum:

(1) List the food safety hazards identified in accordance with paragraph (a) of this section, which must be controlled for each process.

(2) List the critical control points for each of the identified food safety hazards, including, as appropriate:

(i) Critical control points designed to control food safety hazards that could be introduced in the establishment, and

(ii) Critical control points designed to control food safety hazards introduced outside the establishment, including food safety hazards that occur before, during, and after entry into the establishment;

(3) List the critical limits that must be met at each of the critical control points. Critical limits shall, at a minimum, be designed to ensure that applicable targets or performance standards established by FSIS, and any other requirement set forth in this chapter pertaining to the specific process or product, are met;

(4) List the procedures, and the frequency with which those procedures will be performed, that will be used to monitor each of the critical control points to ensure compliance with the critical limits;

(5) Include all corrective actions that have been developed in accordance with Sec. 417.3(a) of this part, to be followed in response to any deviation from a critical limit at a critical control point; and

(6) Provide for a recordkeeping system that documents the monitoring of the critical control points. The records shall contain the actual values and observations obtained during monitoring.

(7) List the verification procedures, and the frequency with which those procedures will be performed, that the establishment will use in accordance with Sec. 417.4 of this part.

(d) Signing and dating the HACCP plan. (1) The HACCP plan shall be signed and dated by the responsible establishment individual. This signature shall signify that the establishment accepts and will implement the HACCP plan.

(2) The HACCP plan shall be dated and signed:

(i) Upon initial acceptance;

(ii) Upon any modification; and

(iii) At least annually, upon reassessment, as required under Sec. 417.4(a)(3) of this part.

(e) Pursuant to 21 U.S.C. 456, 463, 608, and 621, the failure of an establishment to develop and implement a HACCP plan that complies with this section, or to operate in accordance with the requirements of this part, may render the products produced under those conditions adulterated.

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9 C.F.R. § 417.3 Corrective actions.

(a) The written HACCP plan shall identify the corrective action to be followed in response to a deviation from a critical limit. The HACCP plan shall describe the corrective action to be taken, and assign responsibility for taking corrective action, to ensure:

(1) The cause of the deviation is identified and eliminated;

(2) The CCP will be under control after the corrective action is taken;

(3) Measures to prevent recurrence are established; and

(4) No product that is injurious to health or otherwise adulterated as a result of the deviation enters commerce.

(b) If a deviation not covered by a specified corrective action occurs, or if another unforeseen hazard arises, the establishment shall:

(1) Segregate and hold the affected product, at least until the requirements of paragraphs (b)(2) and (b)(3) of this section are met;

(2) Perform a review to determine the acceptability of the affected product for distribution;

(3) Take action, when necessary, with respect to the affected product to ensure that no product that is injurious to health or otherwise adulterated, as a result of the deviation, enters commerce;

(4) Perform or obtain reassessment by an individual trained in accordance with Sec. 417.7 of this part, to determine whether the newly identified deviation or other unforeseen hazard should be incorporated into the HACCP plan.

(c) All corrective actions taken in accordance with this section shall be documented in records that are subject to verification in accordance with Sec. 417.4(a)(2)(iii) and the recordkeeping requirements of Sec. 417.5 of this part.

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9 C.F.R. § 417.4 Validation, Verification, Reassessment.

(a) Every establishment shall validate the HACCP plan's adequacy in controlling the food safety hazards identified during the hazard analysis, and shall verify that the plan is being effectively implemented.

(1) Initial validation. Upon completion of the hazard analysis and development of the HACCP plan, the establishment shall conduct activities designed to determine that the HACCP plan is functioning as intended. During this HACCP plan validation period, the establishment shall repeatedly test the adequacy of the CCP's, critical limits, monitoring and recordkeeping procedures, and corrective actions set forth in the HACCP plan. Validation also encompasses reviews of the records themselves, routinely generated by the HACCP system, in the context of other validation activities.

(2) Ongoing verification activities. Ongoing verification activities include, but are not limited to:

(i) The calibration of process-monitoring instruments;

(ii) Direct observations of monitoring activities and corrective actions; and

(iii) The review of records generated and maintained in accordance with Sec. 417.5(a)(3) of this part.

(3) Reassessment of the HACCP plan. Every establishment shall reassess the adequacy of the HACCP plan at least annually and whenever any changes occur that could affect the hazard analysis or alter the HACCP plan. Such changes may include, but are not limited to, changes in: raw materials or source of raw materials; product

formulation; slaughter or processing methods or systems; production volume; personnel; packaging; finished product distribution systems; or, the intended use or consumers of the finished product. The reassessment shall be performed by an individual trained in accordance with Sec. 417.7 of this part. The HACCP plan shall be modified immediately whenever a reassessment reveals that the plan no longer meets the requirements of Sec. 417.2(c) of this part.

(b) Reassessment of the hazard analysis. Any establishment that does not have a HACCP plan because a hazard analysis has revealed no food safety hazards that are reasonably likely to occur shall reassess the adequacy of the hazard analysis whenever a change occurs that could reasonably affect whether a food safety hazard exists. Such changes may include, but are not limited to, changes in: raw materials or source of raw materials; product formulation; slaughter or processing methods or systems; production volume; packaging; finished product distribution systems; or, the intended use or consumers of the finished product.

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9 C.F.R. § 417.5 Records.

(a) The establishment shall maintain the following records documenting the establishment's HACCP plan:

(1) The written hazard analysis prescribed in Sec. 417.2(a) of this part, including all supporting documentation;

(2) The written HACCP plan, including decisionmaking documents associated with the selection and development of CCP's and critical limits, and documents

supporting both the monitoring and verification procedures selected and the frequency of those procedures.

(3) Records documenting the monitoring of CCP's and their critical limits, including the recording of actual times, temperatures, or other quantifiable values, as prescribed in the establishment's HACCP plan; the calibration of process-monitoring instruments; corrective actions, including all actions taken in response to a deviation; verification procedures and results; product code(s), product name or identity, or slaughter production lot. Each of these records shall include the date the record was made.

(b) Each entry on a record maintained under the HACCP plan shall be made at the time the specific event occurs and include the date and time recorded, and shall be signed or initialed by the establishment employee making the entry.

(c) Prior to shipping product, the establishment shall review the records associated with the production of that product, documented in accordance with this section, to ensure completeness, including the determination that all critical limits were met and, if appropriate, corrective actions were taken, including the proper disposition of product. Where practicable, this review shall be conducted, dated, and signed by an individual who did not produce the record(s), preferably by someone trained in accordance with Sec. 417.7 of this part, or the responsible establishment official.

(d) Records maintained on computers. The use of records maintained on computers is acceptable, provided that appropriate controls are implemented to ensure the integrity of the electronic data and signatures.

(e) Record retention. (1) Establishments shall retain all records required by paragraph (a)(3) of this section as follows: for slaughter activities for at least one year; for refrigerated product, for at least one year; for frozen, preserved, or shelf-stable products, for at least two years.

(2) Off-site storage of records required by paragraph (a)(3) of this section is permitted after six months, if such records can be retrieved and provided, on-site, within 24 hours of an FSIS employee's request.

(f) Official review. All records required by this part and all plans and procedures required by this part shall be available for official review and copying.

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9 C.F.R. § 417.6 Inadequate HACCP Systems.

A HACCP system may be found to be inadequate if:

(a) The HACCP plan in operation does not meet the requirements set forth in this part;

(b) Establishment personnel are not performing tasks specified in the HACCP plan;

(c) The establishment fails to take corrective actions, as required by Sec. 417.3 of this part;

(d) HACCP records are not being maintained as required in Sec. 417.5 of this part; or

(e) Adulterated product is produced or shipped.

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9 C.F.R. § 417.7 Training.

(a) Only an individual who has met the requirements of paragraph (b) of this section, but who need not be an employee of the establishment, shall be permitted to perform the following functions:

(1) Development of the HACCP plan, in accordance with Sec. 417.2(b) of this part, which could include adapting a generic model that is appropriate for the specific product; and

(2) Reassessment and modification of the HACCP plan, in accordance with Sec. 417.3 of this part.

(b) The individual performing the functions listed in paragraph (a) of this section shall have successfully completed a course of instruction in the application of the seven HACCP principles to meat or poultry product processing, including a segment on the development of a HACCP plan for a specific product and on record review.

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9 C.F.R. § 417.8 Agency verification.

FSIS will verify the adequacy of the HACCP plan(s) by determining that each HACCP plan meets the requirements of this part and all other applicable regulations. Such verification may include:

(a) Reviewing the HACCP plan;

(b) Reviewing the CCP records;

(c) Reviewing and determining the adequacy of corrective actions taken when a deviation occurs;

(d) Reviewing the critical limits;

(e) Reviewing other records pertaining to the HACCP plan or system;

(f) Direct observation or measurement at a CCP;

(g) Sample collection and analysis to determine the product meets all safety standards; and

(h) On-site observations and record review.

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9 C.F.R. § 500.2 Regulatory control action.

(a) FSIS may take a regulatory control action because of:

(1) Insanitary conditions or practices;

(2) Product adulteration or misbranding;

(3) Conditions that preclude FSIS from determining that product is not adulterated or misbranded; or

(4) Inhumane handling or slaughtering of livestock.

(b) If a regulatory control action is taken, the program employee will immediately notify the establishment orally or in writing of the action and the basis for the action.

(c) An establishment may appeal a regulatory control action, as provided in §§ 306.5 and 381.35 of this chapter.

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9 C.F.R. § 500.5 Notification, appeals, and actions held in abeyance.

(a) If FSIS takes a withholding action or imposes a suspension, the establishment will be notified orally and, as promptly as circumstances permit, in writing. The written notification will:

(1) State the effective date of the action(s),

(2) Describe the reasons for the action(s),

(3) Identify the products or processes affected by the action(s),

(4) Provide the establishment an opportunity to present immediate and corrective action and further planned preventive action; and

(5) Advise the establishment that it may appeal the action as provided in §§ 306.5 and 381.35 of this chapter.

(b) The prior notification provided for in § 500.4 of this part will:

(1) State the type of action that FSIS may take;

(2) Describe the reason for the proposed action;

(3) Identify the products or processes affected by the proposed action;

(4) Advise the establishment of its right to contact FSIS to contest the basis for the proposed action or to explain how compliance has been or will be achieved; and

(5) Advise the establishment that it will have three business days from receipt of the written notification to

respond to FSIS unless the time period is extended by FSIS.

(c) An establishment may appeal the withholding action or suspension, as provided in §§ 306.5 and 381.35 of this chapter.

(d) If FSIS suspends inspection and does not hold the suspension action in abeyance as provided in paragraph (e) of this section, the establishment may request a hearing pursuant to the Uniform Rules of Practice, 7 CFR Subtitle A, part 1, subpart H. Upon such request, the Administrator will file a complaint that will include a request for an expedited hearing.

(e) FSIS may hold a suspension in abeyance and allow the establishment to operate under the conditions agreed to by FSIS and the establishment.

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7 C.F.R. § 1.131 Scope and applicability of this subpart.

(a) The rules of practice in this subpart shall be applicable to all adjudicatory proceedings under the statutory provisions listed below as those provisions have been or may be amended from time to time,[1] except that those rules shall not be applicable to reparation proceedings under section 6(c) of the Perishable Agricultural Commodities Act, 1930. Section 1.26 shall be inapplicable to the proceedings covered by this subpart.

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[1] See also the regulations promulgated under these statutes for any supplemental rules relating to particular circumstances arising thereunder.

Act of May 29, 1884, commonly known as the Animal Industry Act, section 7, as amended (21 U.S.C. 117).

Act of August 30, 1890, section 6, as amended (21 U.S.C. 104).

Act of February 2, 1903, commonly known as the Cattle Contagious Diseases Act of 1903, section 3, as amended (21 U.S.C. 122).

Act of March 3, 1905, section 6, as amended (21 U.S.C. 127).

Act of July 2, 1962, section 6(a), as amended (21 U.S.C. 134e).

Act of May 6, 1970, section 2, as amended (21 U.S.C. 135a).

Agricultural Marketing Agreement Act of 1937, as amended, section 8c(14), 7 U.S.C. 608c(14).

Animal Health Protection Act, section 10414 (7 U.S.C. 8313).

Animal Welfare Act, section 19 (7 U.S.C. 2149).

Beef Promotion and Research Act of 1985, section 9 (7 U.S.C. 2908).

Egg Products Inspection Act, section 18 (21 U.S.C. 1047).

Endangered Species Act of 1973, as amended, section 11(a) (16 U.S.C. 1540(a)).

Egg Research and Consumer Information Act, as amended, 7 U.S.C. 2714, Pub. L. 96-276, 94 Stat. 541.

Federal Land Policy and Management Act of 1976, section 506 (43 U.S.C. 1766).

Federal Meat Inspection Act, sections 4, 6, 7(e), 8, and 401 (21 U.S.C. 604, 606, 607(e), 608, 671).

Federal Seed Act, section 409 (7 U.S.C. 1599).

Fluid Milk Promotion Act of 1990, section 1999L [7 U.S.C. 6411].

Forest Resources Conversation and Shortage Relief Act of 1990, section 492 (16 U.S.C. 620d)

Fresh Cut Flowers and Fresh Cut Greens Promotion and Consumer Information Act of 1993, section 9 [7 U.S.C. 6808].

Honey Research, Promotion, and Consumer Information Act, section 11 (7 U.S.C. 4610).

Horse Protection Act of 1970, sections 4(c) and 6 (15 U.S.C. 1823(c), 1825).

Lacey Act Amendments of 1981, section 4(a) and (b) (16 U.S.C. 3373(a) and (b)).

Lime Research, Promotion, and Consumer Information Act of 1990, as amended, section 1958 [7 U.S.C. 6207]

Mushroom Promotion, Research, and Consumer Information Act of 1990, section 1928 [7 U.S.C. 6107]

Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, and 401 of the Act, and section 1, 57 Stat. 422, as amended by section 4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 221)

Pecan Promotion and Research Act of 1990, section 1914 [7 U.S.C. 6009]

Perishable Agricultural Commodities Act, 1930, sections 1(b)(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 8(e), 9, and 13(a) (7 U.S.C. 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, 499m(a))

Plant Protection Act, section 424 (7 U.S.C. 7734).

Pork Promotion, Research, and Consumer Information Act of 1985, section 1626 (7 U.S.C. 4815).

Potato Research and Promotion Act, as amended, 7 U.S.C. 2621, Pub. L. 97-244, 96 Stat. 310.

Poultry Products Inspection Act, sections 6, 7, 8(d), and 18 (21 U.S.C. 455, 456, 457(d), 467).

Sheep Promotion, Research, and Information Act of 1994 [7 U.S.C. 7107].

Soybean Promotion, Research, and Consumer Information Act, section 1972 [7 U.S.C. 6307].

Swine Health Protection Act, sections 5 and 6 (7 U.S.C. 3804, 3805).

Title V of the Agricultural Risk Protection Act of 2000, section 501(a) (7 U.S.C. 2279e).

United States Cotton Standards Act, as supplemented, section 3 of the Act and section 2 of 47 Stat. 1621 (7 U.S.C. 51b, 53).

United States Grain Standards Act, sections 7(g)(3), 9, 10, and 17A(d) (7 U.S.C. 79(g)(3), 85, 86, 87f-1(d)).

United States Warehouse Act, sections 12 and 25 (7 U.S.C. 246, 253).

Virus-Serum-Toxin Act (21 U.S.C. 156).

Watermelon Research and Promotion Act, section 1651 (7 U.S.C. 4910).

(b) These rules of practice shall also be applicable to:

(1) Adjudicatory proceedings under the regulations promulgated under the Agricultural Marketing Act of 1946

(7 U.S.C. 1621 et seq.) for the denial or withdrawal of inspection, certification, or grading service;[2]

(2) Adjudicatory proceedings under the regulations promulgated under the Animal Quarantine and Related Laws (21 U.S.C. 111 et seq.) for the suspension or revocation of accreditation of veterinarians (9 CFR parts 160, 161);

(3) Proceedings for debarment of counsel under Sec. 1.141(d) of this subpart; and

(4) Other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.

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7 C.F.R. § 1.133 Institution of proceedings.

(a) Submission of information concerning apparent violations. (1) Any interested person desiring to submit information regarding an apparent violation of any provision of a statute listed in § 1.131 or of any regulation, standard, instruction, or order issued pursuant thereto, may file the information with the Administrator of the agency administering the statute involved in accordance with this section and any applicable statutory or regulation provisions. Such information may be made the basis of any appropriate proceeding covered by the rules in this subpart, or any other appropriate proceeding authorized

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[2] See also the regulations promulgated under these statutes for any supplemental rules relating to particular circumstances arising thereunder.

by the particular statute or the regulations promulgated thereunder.

(2) The information may be submitted by telegram, by letter, or by a preliminary statement of facts, setting forth the essential details of the transaction complained of. So far as practicable, the information shall include such of the following items as may be applicable:

(i) The name and address of each person and of the agent, if any, representing such person in the transaction involved;

(ii) Place where the alleged violation occurred;

(iii) Quantity and quality or grade of each kind of product or article involved;

(iv) Date of alleged violation;

(v) Car initial and number, if carlot;

(vi) Shipping and destination points;

(vii) If a sale, the date, sale price, and amount actually received;

(viii) If a consignment, the date, reported proceeds, gross, net;

(ix) Amount of damage claimed, if any;

(x) Statement of other material facts, including terms of contract; and

(xi) So far as practicable, true copies of all available papers relating to the transaction complained about, including shipping documents, letters, telegrams, invoices,

manifests, inspection certificates, accounts of sales and any special contracts or agreements.

(3) Upon receipt of the information and supporting evidence, the Administrator shall cause such investigation to be made as, in the opinion of the Administrator, is justified by the facts. If such investigation discloses that no violation of the Act or of the regulations, standards, instructions, or orders issued pursuant thereto, has occurred, no further action shall be taken and the person submitting the information shall be so informed.

(4) The person submitting the information shall not be a party to any proceeding which may be instituted as a result thereof and such person shall have no legal status in the proceeding, except as a subpoenaed witness or as a deponent in a deposition taken without expense to such person.

(b) Filing of complaint or petition for review. (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

(2) Any person determined by the Chief, PACA Branch, pursuant to §§ 47.47 – 47.49 of this title to have been responsibly connected within the meaning of 7 U.S.C. 499a(b)(9) to a licensee who is subject or potentially subject to license suspension or revocation as the result of an alleged violation of 7 U.S.C. 499b or 499h(b) or as provided in 7 U.S.C. 499g(d) shall be entitled to institute a proceeding under this section and to have determined the

facts with respect to such responsibly connected status by filing with the Hearing Clerk a petition for review of such determination.

(3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

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7 C.F.R. § 1.145 Appeal to Judicial Officer.

(a) Filing of petition. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue

shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) Response to appeal petition. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) Transmittal of record. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a prehearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) Oral argument. A party bringing an appeal may request, within the prescribed time for filing such appeal,

an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) Scope of argument. Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) Notice of argument; postponement. The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) Order of argument. The appellant is entitled to open and conclude the argument.

(h) Submission on briefs. By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) Decision of the judicial officer on appeal. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

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7 U.S.C. § 6912(e)

(e) Exhaustion of administrative appeals

Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against –

(1) the Secretary;

(2) the Department; or

(3) an agency, office, officer, or employee of the Department.

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4 F.3d 994 (Table), 1993 WL 346858 (6th Cir.(Ohio))
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.
John KRUSINSKI, Plaintiff-Appellant,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD SAFETY AND INSPECTION SERVICE, MEAT AND POULTRY INSPECTION OPERATIONS; Robert Osborn; Michael Hall; Alfred T. Winn; Howard Wright; Donald O. Edwards, In their Official and Individual Capacities, Defendants-Appellees.
No. 92-4026.
Sept. 10, 1993.

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division, No. 86-01933; Matia, J.

N.D.Ohio

REVERSED IN PART AND AFFIRMED IN PART AND REMANDED.

Before: MARTIN and SUHRHEINRICH, Circuit Judges and CELEBREZZE, Senior Circuit Judge.

PER CURIAM.

Plaintiff-appellant, John Krusinski, appeals the decision of the United States District Court for the Northern District of Ohio, Eastern Division, dismissing his complaint filed

on May 8, 1986, against the United States Department of Agriculture (USDA) and five individual defendants, *viz.*, Robert Osborn, Michael Hall, Alfred T. Winn, Dr. Howard Wright, and Dr. Donald O. Edwards. All five individuals were employed by the USDA. Plaintiff alleged his poultry business suffered losses due to the actions of defendants in violation of his due process rights (plaintiff's right to property) and equal protection rights (plaintiff alleges defendants discriminated against him because he is of Polish descent). The matter was referred to a Magistrate Judge. On May 29, 1992, the Magistrate Judge filed a Report and Recommendation which advocated the granting of summary judgment as to the defendant USDA and all defendants in their official capacity, but not as to the defendants in their individual capacity. The district court prematurely accepted the Magistrate Judge's report though both plaintiff and defendants had timely filed their Objections to the Magistrate Judge's Report. The district court vacated its order and considered the timely filed objections. Nevertheless, the district court ultimately adopted the Magistrate Judge's Report. Defendants filed a Motion For Reconsideration on July 16, 1992. On July 30, 1992, plaintiff filed a motion requesting a ten day extension of time to respond to defendants' motion. On July 31, 1992, the district court granted defendants' Motion For Reconsideration and dismissed the case as to the individual defendants. Plaintiff filed a timely Notice of Appeal.

I.

Plaintiff is the owner and operator of a meat and poultry company, Krusinski's Finest Meats, which prepares meat and poultry for wholesale distribution. He was born in Poland and is a naturalized citizen of the United States.

Defendants Osborn and Hall are USDA inspectors in the Food Safety and Inspection Service (FSIS) division. Defendant Winn was the FSIS circuit supervisor for the region which included plaintiff's business. Defendant Wright was an FSIS assistant area supervisor, and defendant Edwards an FSIS area supervisor for plaintiff's area. On July 10, 1980, plaintiff's business became subject to federal inspection (it had formerly been subject only to state inspection). The USDA is a government entity charges [sic] with ensuring that meat and poultry distributed for human consumption is safe and accurately labeled. See The Federal Meat Inspection Act, The Poultry Products Act, and the regulations governing said acts, 21 U.S.C. § 601, *et seq.*; 21 U.S.C. § 451 *et seq.*; 9 C.F.R. Chapter III. On November 22, 1983, at plaintiff's request, the USDA and plaintiff initiated a total plant quality control system (TQC) to ensure both cost effectiveness and quality control. As part of a TQC plan, inspections are performed by the Food Safety and Inspection Service.

On March 13, 1985, the USDA withdrew its TQC approval based on plaintiff's alleged failure to maintain the required standards in sanitation and a failure to follow the TQC system plan. On December 16, 1985, the plant was placed under Intensified Regulatory Enforcement because it [sic] operations chronically fell below FSIS standards.

Krusinski asserts that he was repeatedly harassed by the inspectors because of his Polish heritage. He complains that the inspectors made him perform work that was not required and compelled plaintiff to clean up cigarette butts and other refuse left by the inspectors. Plaintiff argues that the plants' [sic] operations were continually and unjustly being shut down so that he could comply with the inspectors [sic] orders, resulting in lost profits and emotional harm.

The government notes inspections were delayed at times due to plaintiff's alleged harassment of the USDA inspectors which included physical threats made to the inspectors. As a result, plaintiff's son, John Krusinski, Jr., was required to deal with the inspectors without plaintiff being present.

II.

Plaintiff contends the district court erred by not ruling on his Motion For Extension of Time. This motion requested extra time to respond to defendant's motion for reconsideration.

Plaintiff's motion was timely filed on July 30, 1992. The district court issued its ruling on July 31, 1992. The district court's memorandum states that defendant's motion for reconsideration was unopposed. Plaintiff argues that the district court's failure to rule on his motion was an abuse of discretion. Plaintiff further asserts that had the court allowed him an extension of time, defendant's [sic] Motion For Reconsideration would not have been unopposed.

Defendants first contend that it is understandable that the district court failed to rule on plaintiff's motion given the close proximity of time in which the motion was filed and the district court ruled. The government is apparently implying that the district court order was prepared in advance of the deadline and that the district court would not want to alter its order. Such an argument is without merit. Plaintiff's motion requesting an extension of time was timely filed. A court cannot shorten, nor do we think the district court intended to shorten, the time period for filing motions on the pretense that it had already prepared

its memorandum. All plaintiffs are entitled to the full period available under the law for filing motions.

Defendants next argue that plaintiff did, in fact, place his arguments before the district court.

Defendants assert that in plaintiff's brief in opposition to defendant's [sic] Motion For Reconsideration filed on August 7, 1992, plaintiff merely reiterated arguments that he had already raised in the district court. Therefore, defendant's [sic] conclude, plaintiff was not prejudiced by the district court's failure to rule on his motion.

In the case at bar, it must be noted that plaintiff filed his original motion almost six years prior to the district court's ruling. The Magistrate Judge recommended that the individual defendants should not be dismissed from the law suit. Defendants then filed their Motion To Reconsider this issue. Plaintiff filed a timely Motion For Extension of Time to respond to defendants' motion with an affidavit fully explaining why more time was required.

The granting of a Motion For Extension of Time is reviewed under an abuse of discretion standard. Fed.R.Civ.P. 6(b). This court recently considered a similar issue in the context of a motion to amend. This court reiterated its position that "when a motion to amend is not even considered, much less not granted, an abuse of discretion has occurred." *Thompson v. Superior Fireplace Co.*, 931 F.2d 372, 374 (6th Cir.1991) (per curiam) *citing Marks v. Shell Oil*, 830 F.2d 68, 69 (6th Cir.1987) [a]*ccord Ellison v. Ford Motor Co.*, 847 F.2d 297, 300-301 (6th Cir.1988) (per curiam). Likewise in the case at bar, it is clear the district court did not consider plaintiff's motion for an extension of time. We know this to be true since the district court specifically noted that defendants' Motion

For Reconsideration was unopposed. It was obviously unopposed because plaintiff needed more time to prepare a response. Plaintiff's motion requesting the extension of time specifically stated that more time was needed to properly prepare a response to defendant's [sic] motion. Seemingly valid reasons for needing this extension were supplied in the form of an affidavit from plaintiff's lawyer. Accordingly, it appears the district court abused its discretion by failing to consider plaintiff's timely filed motion.

III.

Plaintiff contends the district court erred by granting defendants' motion for reconsideration which granted defendants' motion to dismiss the claims against the defendants' in their individual capacities. The Magistrate Judge recommended that defendants motion to dismiss be denied. The district court accepted the magistrate judge's recommendation. Defendants filed a Motion For Reconsideration. Then, without allowing plaintiff an extension of time to respond, the district court granted defendants' motion for reconsideration and dismissed the claims as to the defendants in their individual capacity. Plaintiff argues that this was error, that he adequately stated a claim upon which relief could be granted, to-wit: a deprivation of his due process and equal protection rights.

This court will review the granting of a motion to dismiss *de novo. Thompson,* 931 F.2d at 374; *American Eagle Credit Corp. v. Gaskins,* 920 F.2d 352, 353 (6th Cir.1991). The court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that

would entitle him to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 111 S.Ct. 182 (1990).

In the case at bar, defendants asserted the defense of qualified immunity. This court will review such an assertion *de novo*. *Meyers v. City of Cincinnati*, 979 F.2d 1154 (6th Cir.1992). The doctrine of sovereign immunity does not bar damage actions against federal officials who have been sued in their individual capacities for violation of a plaintiff's constitutional rights. *Ecclesiastical Order of the ISM of Am. Inc. v. Chasin*, 845 F.2d 113, 116 (6th Cir.1988) (per curiam) (citations omitted). In the case *sub judice*, a fair reading of the complaint demonstrates that each defendant was named individually for actions exceeding the official scope of his duties. Plaintiff alleges violations of both his due process rights and his equal protection rights. Viewing the evidence in a light most favorable to plaintiff, plaintiff has definitely stated a cause against the individual defendants upon which relief can be granted. Accordingly, the district court erred by dismissing the claims against the individual defendants.

Plaintiff also contends that the district court applied the wrong standard of review. Plaintiff argues that although the district court stated its decision in terms of a Fed.R.Civ.P. 12(b)(6) dismissal, the district court actually dismissed the case pursuant to Fed.R.Civ. 56(c), Summary Judgment. In light of our previous holding that plaintiff's complaint was wrongly dismissed, this court need not address this issue.

IV.

Plaintiff also claims the district court erred in dismissing his claims against the USDA and the agents in their official capacities. Plaintiff argues that it would have been futile to attempt to resolve his claims via administrative avenues. As proof of this, plaintiff notes that an administrative claim was filed two years after the complaint was filed in the instant case and that it still had not been ruled on.

Initially, it must be noted that the Magistrate Judge's recommendation, subsequently adopted by the district court, states two grounds for dismissing plaintiff's claims. The court first noted that plaintiff had failed to demonstrate that the United States government had waived its sovereign immunity. Secondly, the court noted that plaintiff had administrative remedies available to him which he failed to use.

There is no question that the United States is immune from suit under the doctrine of sovereign immunity. *United States v. Shaw*, 309 U.S. 495, 500-01 (1940). Furthermore, merely naming the United States or its agents in a law suit does not avoid this immunity. *Ecclesiastical Order of the ISM of Am. Inc.*, 845 F.2d at 115. Plaintiff has cited no authority which would allow him to proceed on his constitutional claims.

Plaintiff could bring suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq.* As the Supreme Court noted, this Act is "the exclusive mode of recovery for the tort of a Government employee even when the [Act] itself precludes government liability." *United States v. Smith*, 111 S.Ct. 1180, 1185 (1991). However, before bringing a FTCA claim, plaintiff is required to first

exhaust his administrative remedies. *Lundstrom v. Lyng*, 954 F.2d 1142, 1145 (1991); 28 U.S.C. § 2675(a).

In the case at bar, plaintiff argues that he is not required to exhaust his administrative remedies if it would be a futile act. The burden of proving the futility of exhausting administrative remedies rests upon plaintiff. *Crocker v. Tennessee Secondary Sch. Athletic Ass'n.*, 873 F.2d 933, 937 (6th Cir.1989). In the case at bar, plaintiff has failed to meet this burden. Although on appeal he suggests that the delay required in pressing for administrative relief would have resulted in his business going into bankruptcy, he failed to introduce sufficient evidentiary proof on this matter. Moreover, as defendants note in their brief, plaintiff would only have been required to wait six months for the federal agency to rule. Pursuant to 28 U.S.C. § 2675(a), after six months, if a federal agency has failed to issue a ruling, the claimant may file suit on the claim in federal court. Hence, the district court properly dismissed plaintiff's claims for failure to exhaust his administrative remedies.

V.

The Order of the District Court is REVERSED IN PART and AFFIRMED IN PART and REMANDED. The case is reversed and remanded as to those claims against the defendants in their individual capacity only. The Order of the district court is affirmed as against the USDA and the individual defendants in their official capacity.

SUHRHEINRICH, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's decision to affirm the dismissal of plaintiff's claims against the United States Department of Agriculture and the five individual defendants in their "official capacit[ies]." *Maj.Op.* at 9. Respectfully, however, I must dissent from the majority's decision reversing the district court's dismissal of plaintiff's claims against the five individual defendants in their "individual capacit[ies]." *Maj.Op.* at 9.

Complaints attempting to state a so-called *Bivens* cause of action are subject to the same heightened pleading requirements applied to claims under 42 U.S.C. § 1983. *Nuclear Transport & Storage v. United States*, 890 F.2d 1348 (6th Cir.), *cert. denied*, 494 U.S. 1079 (1989). Thus, the plaintiff in this case was required to "set forth *clearly* in [his] pleading that [he is] suing the . . . defendants in their individual capacity for damages, not simply in their [official] capacity. . . . " *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir.1989). This he did not do.

The caption of plaintiff's complaint does not state whether the individual defendants were being sued in their official or individual capacity.[1] Plaintiff, however, lists the address of each defendant as "c/o United States Department of Agriculture." Most importantly, paragraph six of the complaint lists each of the individual defendants and states that they were "at all times herein relevant *employees of the defendant agency*, and acted at all relevant times pursuant to the authority granted them *in the official capacities* as employees of the agency." [Emphasis added.]

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[1] The caption to the majority's opinion states that the individual defendants are being sued "In their Official and Individual Capacities."

Throughout the complaint, allegations of misconduct are ascribed simply to the "defendants." Not only does this term encompass the agency as well as the individuals, it includes individuals who dealt personally with plaintiff as inspectors at his plant and also includes supervisors who have never seen plaintiff or been to the plant. With a single exception not amounting to a constitutional violation, the complaint fails to ascribe any particular act to any particular defendant. Rather, plaintiff's complaint employs a "shotgun" approach; throwing everything against the wall and hoping some sticks.

Plaintiff's complaint fails to invoke the court's jurisdiction in that it has not plead with sufficient particularity the capacity in which the defendants are being sued. It fails to allege that any particular defendant committed any particular act. It fails to allege any one act, or a totality of actsm [sic], that constitutes a constitutional violation. Finally, the complaint fails to show a violation of clearly established law such that defendants' defense of qualified immunity will not lie. The heightened pleading requirements for suits against the government and its actors are designed to weed out, at an early stage, frivolous lawsuits. These policies are ill-served by the majority's decision in the present case. While I concur in the bulk of the majority's opinion, I respectfully dissent from Section III., *Maj.Op.* 6-7, and would affirm the district court in all respects.

It should be noted, however, that neither plaintiff's complaint, nor his Notice of Appeal, so states.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE VEAL CONNECTION CORP., dba VELASAM; SIMON SAMSON; JOHANNA SAMSON,

Plaintiffs,

v.

ROY THOMPSON; DR. WAYNE AKERS; CHARLES RIDDLE; JOHN CAMERON; NEAL H. HASHEIDER; DR. MICHAEL MCGOVERN; MARLENE STEWART; RAUL OLIVAS; DR. PAUL E. THOMPSON; KIRK ELLIOT,

Defendants. /

No. C 96-04486 CW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Dec. 12, 2001)

Defendants move for summary judgment on all of Plaintiffs' claims against them. Plaintiffs oppose the motion for summary judgment, request judicial notice of certain documents submitted in opposition, and move to strike portions of declarations submitted in support of the motion for summary judgment. Defendants also move to strike portions of declarations submitted by Plaintiffs. The matter was heard on August 10, 2001. Having considered all of the papers filed by the parties and oral argument on the motion, the Court GRANTS the motion for summary-judgment in part and DENIES it in part (Docket No. 52). The Court GRANTS Plaintiffs' request for judicial notice (Docket No. 101) and GRANTS in part the motions to strike and DENIES them in part (Docket Nos. 108 & 114).

STATEMENT OF FACTS

I. General Background

Plaintiffs the Veal Connection Corporation, dba Velasam (Velasam), and its owners Simon Samson and Johanna Samson, allege that federal officials violated their constitutional rights. Plaintiffs operate a Petaluma meat-processing plant subject to federal meat inspection by the Food Safety and Inspection Service (FSIS), an agency of the United States Department of Agriculture (USDA).

Plaintiff Simon Samson is the owner and Chief Executive Officer of Velasam; Plaintiff Johanna Samson, Mr. Samson's wife, is Velasam's manager. Defendant Neal Hasheider is a special agent for the USDA Office of Inspector General (OIG). All other Defendants are current or former officials of the FSIS. Specifically, Defendants Roy Thompson and Kirk Elliott are FSIS compliance officers; Defendant Wayne Akers[1] was an FSIS supervisor of inspection operations; Defendant Charles Riddle was an FSIS processing staff officer; Defendants John Cameron and Marlene Stewart are FSIS processing inspectors; Defendant Michael McGovern was an area supervisor for the Western Region of FSIS Inspections Operations; Defendant Raul Olivas is an FSIS officer in charge of the Western Compliance Office; Defendant Dr. Paul E. Thompson is the regional director for the Western Region of FSIS Inspection Operations. Plaintiffs sue each Defendant in his or her personal capacity.

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[1] After settling their claims against Defendant Akers, on August 7, 2001 Plaintiffs dismissed all of their claims against him.

The Secretary of Agriculture delegates responsibility for implementing the Federal Meat Inspection Act (FMIA) to the FSIS, to ensure that meat products are safe, wholesome, and properly labeled. *See* 21 U.S.C. §§ 601 *et seq.*; *see also* Declaration of Dr. Richard H. Beck (Beck Decl.), ¶¶ 2-5.

The FSIS Inspection Program carries out the USDA's food safety responsibilities primarily through intensive in-plant slaughter and processing inspection programs. *See id.* Processing plants are inspected on a daily basis. *See id.* FSIS inspectors are assigned to inspect meat processing establishments on a rotating basis, with the assignment changing every six months. *See* Declaration of Marlene Stewart (Stewart Decl.), ¶ 2.

In processing plants such as Velasam's, deficiencies are documented by an FSIS inspector on a Process Deficiency Record (PDR). *See* Beck Decl., ¶ 5. The PDR is also used to document the corrective action and the actions that the establishment is to take to prevent recurrence. *See id.;* Stewart Decl., ¶ 2.

Title 9 Code of Federal Regulations Section 310, *et seq.*, requires inspectors to retain, at the time of inspection, each carcass in which a lesion or other condition is found that might render the meat unfit for food purposes or otherwise adulterated. *See* 9 C.F.R. § 310 *et seq.* (1995 & 1996). Unless authorized by an FSIS employee, retained carcasses are not to be washed or trimmed. *See* 9 C.F.R. § 310.3. "U.S. Retained" tags are used for the temporary identification of retained carcasses, organs and other parts. *See* 9 C.F.R. § 310.4. "U.S. Retained" tags are not to be removed until the final inspection and are only to be removed by an FSIS employee. *See* 9 C.F.R. §§ 310.3-310.4.

Title 9 C.F.R. § 305.1(a) provides that an official number is granted to each facility granted inspection. Only the facility to which inspection has been granted may use the official number. 9 C.F.R. §§ 301.1(b) & (c). No operations requiring inspections shall be conducted except under the supervision of an FSIS employee. *See* 9 C.F.R. § 307.4. Each official establishment must submit a work schedule to the area supervisor for approval, and any change in the work schedule must be submitted to the area supervisor at least two weeks in advance of the proposed change. *See* 9 C.F.R. § 307.4(d). Without inspections, a plant cannot legally process meat under 21 U.S.C. § 610.

Inspection may be withdrawn from an official establishment by the Administrator of the FSIS Inspection Program, or any other officer or employee to whom authority has been delegated, "where the sanitary conditions are such that its products are rendered adulterated, or for failure of the operator to destroy condemned products as required by the Act and the regulations in this subchapter." 9 C.F.R. § 305.5(a). It has long been FSIS policy and practice to withhold inspection from a facility for removing or tampering with a "U.S. Retained" tag, or for working outside of its approved hours. *See* Beck Decl., ¶¶ 6-7.

Likewise, the assignment of inspectors at a facility may be temporarily suspended, in whole or in part, by the Administrator or any other officer or employee to whom authority has been delegated, when a person from the facility being inspected "threatens to forcibly assault or forcibly assaults, intimidates or interferes with any FSIS employee in or on account of the performance of his official duties under the act . . . " 9 C.F.R. §§ 305.5(b) & 335.20. Inspection services are suspended until the establishment

"(1) satisfactorily justifies the incident, (2) takes effective steps to prevent a recurrence, or (3) provides acceptable assurance that there will not be any recurrence." 9 C.F.R. § 305.5(b).

Section 306.5 provides that appeals from decisions of an FSIS employee are to be made to the FSIS employee's immediate supervisor who has jurisdiction over the subject matter of the appeal. *See* 9 C.F.R. § 306.5; *see also* Declaration of Dr. Paul Thompson (Dr. Thompson Decl.), ¶ 3.

The FSIS Compliance Program supplements the in-plant inspection activities by monitoring meat products as they move through channels of distribution. *See* Declaration of Raul Olivas (Olivas Decl.), ¶ 1. The Compliance Program is often conducted in cooperation with the USDA Office of the Inspector General (OIG) to investigate alleged violations of the FMIA. *See id.* Officers of the Compliance Program provide expertise and knowledge of the meat industry, applicable laws and regulations, FSIS inspection procedures, sampling, detention and other enforcement actions. *See id.*

II. Incidents Relevant to this Case[2]

A. The Tag Removal Incident

In late July or early August, 1995, Velasam purchased lamb carcasses at the Sonoma County Fair auction. On August 9, 1995, Defendant Stewart issued a PDR to Velasam because she observed two lamb carcasses with black residue on them. Defendant Stewart tied the two carcasses together with a rubber band or tie and tagged them with a single "U.S. Retained" tag. *See* Stewart Decl., ¶ 4; Declaration of Teresa Barrett (Barrett Decl.), ¶ 9.[3]

On the morning of August 10, 1995, Defendant Stewart rescinded the PDR after learning that Velasam planned to donate the meat to charity. Defendants assert that Defendant Stewart did not remove the "U.S. Retained" tag at that time, because the carcasses needed to be retained until the residue was trimmed off, but rather confirmed that the two carcasses still bore the tag. *See* Stewart Decl., ¶ 5. Plaintiffs contend that Defendant Stewart removed the "U.S. Retained" tag the morning of August 10. *See* Barrett Decl., ¶ 5. Plaintiffs claim that a Velasam employee, Teresa Barrett, left phone Messages with Defendant Stewart's supervisor, Assistant Area

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[2] The facts set out below are undisputed, except where it is noted that the parties are in dispute about certain facts. Where it is stated that one party asserts or argues that a certain fact exists, this indicates that the Court has not determined that the fact is undisputed, either because the evidence supporting the contention is insufficient, or because the other party has submitted evidence creating a dispute of fact.

[3] Plaintiffs appear to dispute this fact, but do not present evidence refuting it. In fact, plaintiffs admit that at some point in time two lamb carcasses were tied together, and one "U.S. Retained" tag was attached to them. *See,* Barrett Decl., ¶ 9.

Supervisor Dr. Alfred Aquino, after Defendant Stewart departed on August 10, to seek clarification of Defendant Stewart's seemingly contradictory actions. *See id.* That afternoon, after being instructed to do so by Dr. Aquino, Defendant Stewart returned to Velasam and reissued the PDR. Plaintiffs allege that at that time Defendant Stewart also re-tagged a lamb carcass (it is not clear which one). *See* Barrett Decl., ¶ 6. Plaintiffs claim that Ms. Barrett again phoned and faxed Dr. Aquino as well as Dr. Akers, another of Defendant Stewart's supervisors, to attempt to clarify Defendant Stewart's conduct. *See* Barrett Decl., ¶ 6.

On August 11, 1995, in an apparent effort to resolve the PDR and "U.S. Retained" tag issued by Defendant Stewart the previous two days, Plaintiffs destroyed several meat carcasses by pouring denaturant on them, in the presence of Defendant Stewart. Defendant Stewart noticed that one of the destroyed lamb carcasses bore a "U.S. Retained" tag, Defendants assert it was the same tag issued on August 9 and originally attached to two carcasses, but the rubber band or tie was broken and the second carcass was no longer attached. *See* Stewart Decl., ¶ 9. Subsequently, Defendant Stewart issued a PDR for tampering with a "U.S. Retained" tag, and suspended inspection services. *See id.* ¶ 10.

Defendants claim the suspension occurred because Defendant Stewart could not verify that the second retained lamb carcass, which was detached from the one with the "U.S. Retained" tag, had not entered human food channels. *See id.* Without opposition, Defendants assert that, since at least 1962, the FSIS has had a policy and practice of withholding inspection from an establishment for removing or tampering with a "U.S. Retained" tag. *See* Beck Decl., ¶ 6; Dr. Thompson Decl., ¶ 4. Plaintiffs dispute

this explanation and contend that all the potentially tainted meat was destroyed. *See* Barrett Decl., ¶ 10; Declaration of Simon Samson (S. Samson Decl.), ¶¶ 9-10.

Dr. Akers, after reviewing Defendant Stewart's actions and concluding that they were appropriate, refused to reinstate inspection services until Mr. Samson submitted a letter of explanation, which he refused to do. On August 15, 1995, after a meeting of Mr. Samson, Dr. Akers and Dr. Aquino, Dr. Aquino indicated that Velasam could start with a "clean slate," and inspection services were reinstated. Plaintiffs contend, and Defendants dispute, that Dr. Aquino also promised that all previous PDRs would be closed. *See* S. Samson Decl., ¶ 11.

On August 31, 1995, Defendant Stewart issued a PDR to Velasam after observing a piece of fat on a tub in the processing room during a pre-operational sanitation inspection. On September 6, 1995, Defendant Stewart issued a memorandum to Velasam regarding past PDRs to which Velasam had not responded, noting Velasam's noncompliance with FSIS Directive 8820.1, which requires that plants respond in writing to PDRs. On September 13, 1995, Defendant Stewart, while completing a computer-generated inspection task, issued a PDR because three lights at Velasam's plant did not meet compliance standards. *See* Stewart Decl., ¶¶ 14-16.

In various meetings in August and September, 1995, Plaintiffs complained to several of Defendant Stewart's supervisors about her conduct. *See* S. Samson Decl., ¶¶ 11, 14. Plaintiffs contend that, in response to one of these complaints, Defendant McGovern directly threatened Plaintiffs, that if they did not stop complaining about Defendant Stewart, he and other senior USDA officials

including Defendants Stewart and Dr. Paul Thompson would "cause more serious problems for Velasam," or words to that effect. *See id.* ¶ 16. Defendants dispute that Defendant McGovern made such a statement.

B. Saturday Unauthorized Work Incident

On Saturday, October 7, 1995, Inspector Patricia Gray found Velasam operating on a day when no inspection was scheduled or approved. Inspector Gray retained the meat being worked on and withheld inspection services. Plaintiffs concede that they had forgotten to notify the FSIS that they would be working that Saturday to evaluate potential new employees.

On October 10, 1995, Defendant McGovern asked Mr. Samson to provide him with a written plan for correcting this problem, including ensuring access to the facility during hours that the plant was not in operation, as required by 9 C.F.R. § 306.2. On October 11, Defendant McGovern sent a letter to Mr. Samson detailing what actions must be taken to resume inspection at Velasam's facility. Although Mr. Samson sent numerous faxes over the next few days, Defendant McGovern found that the problems identified had not been adequately addressed. On October 18, 1995, Defendant McGovern developed an inspection action plan to prevent recurrence of the problems at the facility and inspection services were reinstated. Plaintiffs' expert states that the eleven-day suspension of inspection services was abnormally long and was mishandled by Defendant McGovern. *See* Declaration of Luverne L. Gast (Gast Decl.), ¶ 11.D. Plaintiffs also point to the following note written by Defendant Dr. Thompson, Defendant McGovern's supervisor, and dated

October 26, 1995 stating in part that "we could be vulnerable for withholding for extended period. . . ." Slavittt Decl., Ex. AA.

C. Plaintiffs' Complaints and FSIS Assessment

In mid-October, 1995, Mr. Samson wrote letters to senior USDA officials, congressional representatives, the Attorney General and the President complaining about the FSIS. These letters focused primarily on the August and October, 1995 incidents in which inspections were withheld, but the letters also mentioned incidents dating back to 1986. Several Senators responded to the letters and requested that the USDA officially answer Mr. Samson's complaints.

In response to the Senators' requests, the FSIS Internal Assessment Division (IAD) initiated an extensive investigation and assessment of Mr. Samson's complaints. The IAD conducted a preliminary inquiry into Mr. Samson's allegations on October 16, 1995, and a Program Assessment of the allegations on November 28, 1995. After reviewing documents and conducting interviews, the IAD concluded that Mr. Samson's allegations were without merit. The IAD also concluded that FSIS officials were on occasion being too lenient by accepting inadequate responses to documented deficiencies at Velasam.

D. Investigation of Velasam

Other issues regarding Velasam surfaced during the IAD's assessment of Mr. Samson's complaints, and were referred to the USDA's Compliance Program and the OIG. In November, 1995, Chuck Ellis of the IAD contacted Defendant Raul Olivas, who at the time was Officer-in-Charge of

the FSIS Compliance Program for the Western Region. Mr. Ellis requested that a Compliance Officer assist him in his investigation of shipments by Velasam of imported meat product from Holland in July, 1995. Defendant Olivas assigned Compliance Officer Eric Jensen to inquire at the brokerage company that handled the imported meat. The inquiry revealed that Velasam had imported four different shipments of meat without proper FSIS import inspection.

Defendant Olivas then reviewed all of Mr. Samson's complaints and found a statement from Inspector Gray regarding the October, 1995 Saturday unauthorized work incident when Velasam was caught operating outside of approved hours.

On December 1, 1995, Defendant Olivas and Compliance Officer Jensen met with Inspector Gray, and she identified a former Velasam employee – Martina Mares – who was willing to speak with them. On the same day, Defendant Olivas and Mr. Jensen met with Ms. Mares. She provided the name of another person who was willing to talk about production practices at Velasam on condition that his or her identity remain confidential.

In these interviews, both Ms. Mares and the confidential informant indicated that they had worked late on weekdays after the FSIS inspector had left, and on Saturdays, without the knowledge or presence of an FSIS inspector. Ms. Mares described the unauthorized mixing of product from different species of animals, and meat that was slimy and green. Both Ms. Mares and the confidential informant indicated that they were taught to add a white powder to the meat during the processing, and that the white powder was kept out of sight and not used when the USDA inspector was present. Defendant Olivas believed

the white powder was sodium sulfite, which can effectively mask odor and discoloration of spoiled meat. It is illegal to add sulfites to meat in processing. *See* 21 C.F.R. § 182; 9 C.F.R. § 318.7(d).

Based on the information obtained from Ms. Mares and the confidential informant, on December 5, 1995, the FSIS compliance officers commenced performing field tests on Velasam products randomly at the premises of Velasam's customers (hotels, restaurants, etc.) throughout the United States. *See* Declaration of Roy Thompson (R. Thompson Decl.), ¶ 3; Declaration of Neal Hasheider (Hasheider Decl.), ¶ 5. Approximately ten to fifteen compliance officers participated in the testing. *See* Olivas Decl., ¶ 5. Defendants Kirk Elliott and Roy Thompson, who were both compliance officers, assisted in the compliance investigation. *See* R. Thompson Decl., ¶ 2; Declaration of Kirk Elliott (Elliott Decl.), ¶ 3. Initially, Defendant Olivas instructed the compliance officers to test meat from other processors as well as that from Velasam and to refrain from telling the Velasam customers that Velasam was the subject of the inquiry. After Malachite Green tests on Velasam products came back positive for sulfites, compliance officers tested only Velasam products. *See* Olivas Decl., ¶ 5.

On December 7, 1995, an official from the Compliance Program contacted the Western Regional Office of the OIG to request that a criminal investigation be conducted into whether Velasam was adulterating meat products and operating outside of inspection hours. Defendant Neal Hasheider, a Senior Special Agent, was assigned to conduct the OIG investigation.

On December 14, 1995, a Magistrate Judge issued a warrant to search Velasam's premises, based on an affidavit of Defendant Hasheider. *See* Revised Declaration of Howard A. Slavitt (Slavitt Decl.), Ex. A (Affidavit in Support of Search Warrant); *see also In re Search of Velasam Veal Connection Corp.*, Case No. 95-30570 PJH. In drafting the affidavit, Defendant Hasheider relied on information provided to him by Compliance Program officials, including Defendants R. Thompson and Olivas, regarding the sulfite tests and the interviews with Ms. Mares and the confidential informant. *See* Hasheider Decl.,¶ 10; R. Thompson Dep. at 57:11-23. Defendant Hasheider did not independently verify the information provided to him by Compliance Program officials before including it in the affidavit.

Defendant Hasheider's affidavit states that nine samples of Velasam product had been tested using the Malachite Green test, and that seven (including samples tested in Hawaii, Florida, Kansas City, and California) had tested positive for sulfites, while two were inconclusive.[4] *See* Slavitt Decl., Ex. A at ¶ 11. Defendant Hasheider

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[4] Plaintiffs contend that more than nine Malachite Green field test results were available when Defendant Hasheider submitted his affidavit and that there were several negative results, *see* Slavitt Decl., Ex. B, while Defendants assert that Defendant Hasheider was told by Compliance Program officials that seven of a total of nine tests taken were positive as stated in the affidavit, *see* Hasheider Decl., ¶ 7. To support this discrepancy, Plaintiffs cite an undated chart apparently prepared by Defendant R. Thompson. *See* Slavitt Decl., Ex. B. Defendant R. Thompson testified that according to his chart of the field test samples, as of December 14, 1995, there were a total of fourteen Malachite Green field tests performed, and that nine of them had positive results. *See* R. Thompson Dep. at 77:4-78:11; Slavitt Decl., Ex. B (R. Thompson's Chart). However, the chart only provides the "date sampled," not the date the test results were available. *See id.* Plaintiffs

(Continued on following page)

was told by Defendant Olivas, and stated in his affidavit, that the samples would be retested at the USDA laboratory using the Monier-Williams test to determine the levels of sodium sulfite. The Monier-Williams test is able not only to measure the levels of sodium sulfite in a sample (which the Malachite Green test cannot), but is also more accurate than the Malachite Green test, which can result in false positives. This was not explained in the affidavit, but there is no evidence Defendant Hasheider was aware of the potential inaccuracy of the Malachite Green test when he wrote the affidavit.[5] *See* Hasheider Dep. at 70:2-11; 106:9-14.

On December 15, 1995, Defendant Hasheider, along with other OIG and FSIS officials including Defendants John Cameron and Charles Riddle, executed the search warrant at Velasam. *See* Hasheider Decl., ¶ 11; Cameron Dep. at 43:13-15; Hasheider Dep. at 240:18-241:25. The results of the search are discussed below.

E. Velasam's Customers

As part of the investigation of Velasam's use of sulfites, on December 19 and 21, 1995, Defendant Roy Thompson visited a Velasam customer, Petrini's Markets,

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have presented no evidence that this chart was available when Defendant Hasheider wrote the affidavit, or that specific information from the chart was provided to Defendant Hasheider.

[5] There is evidence in the record that, prior to completion of the affidavit, Defendant Olivas informed Defendant Hasheider that the Malachite Green test was "a reliable field test as an indication of the presence of sulfites," Hasheider Dep. at 68:5-6, but Defendant Hasheider later learned that the test was only an indicator, not a reliable test, *see id.* at 83:8-17.

to collect samples of Velasam's meat product. *See* R. Thompson Decl., ¶ 4. Thereafter, Defendant Olivas instructed him to visit Petrini's Markets' corporate offices and request invoices for Velasam's products purchased by them.

Plaintiffs contend that Defendant R. Thompson directed Petrini's Markets not to sell Velasam products. Plaintiffs point to a letter from David Benjamin, counsel for Petrini's Markets, to Defendant R. Thompson stating, "On December 20, 1995, you requested that Petrini's not sell any meats of Velasam until further notice, because you were investigating Velasam." Declaration of David R. Benjamin (Benjamin Decl.), Ex. A; R. Thompson Dep. at 170:19-172:13. Defendants dispute that R. Thompson ever told Petrini's Markets not to sell Velasam products. *See* R. Thompson Decl., ¶ 4 ("At no time did I request that Petrini's Markets not sell Velasam's products."). Defendant R. Thompson testified that he attempted to clarify the misunderstanding through telephone calls to Mr. Benjamin, but Mr. Benjamin did not return the calls. *See id.*; R. Thompson Dep. at 170:19-172:13.[6] Defendant R. Thompson reported this to his superior, Dale Bagley, who told him to make a note of it and then forget about it. *See id.*

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[6] Plaintiffs also present evidence that an FSIS official told another Velasam customer, Silver Creek Country Club, that Velasam was being investigated for adulterating meat, and encouraged that customer not to order any more products from Velasam. *See* Declaration of Peter Harvey, ¶ 4; S. Samson Decl., ¶ 40. Plaintiff Simon Samson asserts that the chef at Silver Creek Country Club informed him the FSIS official was Roy Thompson, but this is inadmissible hearsay not covered by an exception. Defendants' objection to this portion of Mr. Samson's Declaration is sustained.

During the sampling of Velasam products to test for sulfites, Defendant Elliott purchased a sample of Velasam meat from the Denver Marriott Tech Center hotel. Plaintiffs argue that, by taking this action, Defendant Elliott knew "he would taint Velasam with the speculation of misconduct." Pl.'s Mem. Opp'n. to Def.'s Mot. Summ. J. at 17. Defendant Elliott admitted such a purchase would probably cause a customer to believe there were suspicions regarding the subject company's products. *See* Elliott Dep. at 29:21-25. Defendant Elliott did not inform the hotel that the sample tested did not show any contamination. *See id.* at 30:1-11. Plaintiffs also claim that Defendant Elliott knowingly cultivated a misperception by another Velasam customer, the Hyatt Regency in Beaver Creek, that Velasam's products contained sulfites, by telling a hotel representative the Malachite Green field test was positive for sulfites prior to receiving more accurate laboratory results.[7]

F. The Voluntary Recall, Harassment Incident and First Consent Decree

On January 19, 1996, the FSIS requested that Velasam institute a voluntary recall of all products nationwide,

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[7] Defendant Elliott was also involved in a May, 1997 handling of the meat products that were retained in the December, 1995 search. Plaintiffs contend that Defendant Elliott caused the retained meat to be altered by removing "U.S. Retained" tags (over the objections of Plaintiffs, who thought the evidence should be preserved for litigation purposes), and leaving the freezer open when he left to allow Velasam employees to search for more tags. *See* Barrett Decl., ¶¶ 13-14. Defendants contend Defendant Elliott was simply doing his job in removing tags that were no longer necessary, and dispute that Elliott left the freezer open when he departed. *See* Elliott Decl., ¶¶ 9-10.

which Velasam did. On January 27, 29, and 30, 1996, the first shipments of the recalled product arrived at Velasam. Defendants Cameron, Riddle, and Roy Thompson, along with Processing Inspector Rora Field, directly supervised the recall procedures.[8]

During the recall, Ms. Field, pursuant to Defendant Riddle's instructions, issued two PDRs regarding the condition and handling of the returned product. *See* Declaration of Charles Riddle (Riddle Decl.), ¶ 7. One of the PDRs addressed returned products received in unwholesome or insufficiently identified condition. *See* Slavitt Decl., Ex. W. The other PDR, according to Defendants, resulted from Velasam employees opening boxes of returned product, dumping the contents in the back of a truck, and pouring denaturant on them in violation of instructions from FSIS officials. *See* Slavitt Decl., Ex. X; Riddle Decl., ¶ 6; R. Thompson Decl., Ex. 1. Plaintiffs contend that no such instructions were given regarding the handling of recalled product. *See* S. Samson Decl., ¶ 52; Durler Decl., ¶ 11.

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[8] Plaintiffs claim that, during this same time period after the December 15, 1995 search, Ms. Field, the inspector assigned to Velasam, conducted lengthier and more intensive pre-operation inspections than usual, at the direction of her supervisors, including Defendant Riddle. Plaintiffs claim that there were often two inspectors present instead of one (Dr. Akers joined Ms. Field), and that inspections occurred on a much more frequent basis than previously. *See* S. Samson Decl., ¶ 36; Barrett Decl., ¶ 12; Durler Decl., ¶ 7. Two PDRs were issued by Ms. Field at the direction of Defendant Riddle as a result of these pre-operation inspections, relating to residue from previous productions left on production tables and a knife and steel. *See* Slavitt Decl., Exs. M, N; Riddle Decl., ¶ 7. Plaintiffs' expert claims these pre-operation inspections were excessively extensive. *See* Gast Decl., ¶ 10.C.

The parties dispute the other events that occurred at the Velasam plant during the recall. Plaintiffs allege that Defendant Cameron attempted to entrap Velasam into violating the recall procedures by informing Velasam employees that certain recalled products could be resold. *See* S. Samson Decl., ¶ 47; Durler Decl., ¶ 11. Defendants dispute that Defendant Cameron made such a statement. *See* Declaration of John Cameron (Cameron Decl.), ¶ 4 ("I stated that condemnation of the product might not be necessary if it was tested in the laboratory and found not to be adulterated. At no time did I say that any product could be resold because nothing was wrong with it."). Defendants allege that Mr. Samson and two Velasam employees, Gordon Durler and Douglas Achterberg, threatened, verbally harassed and intimidated Defendants Riddle and Roy Thompson during the FSIS' supervision of the recall procedure. *See* Riddle Decl., ¶¶ 8-15; R. Thompson Decl., ¶ 5 & Ex. 1; Durler Decl., Ex. B. Plaintiffs do not dispute that on January 30, loud and/or harsh words were spoken by Velasam employees, photographs of FSIS officials were taken by Velasam employees, limousines with tinted windows were present on Velasam's premises, and security was higher than usual at Velasam. *See, e.g.*, S. Samson Decl., ¶¶ 54-55.

Plaintiffs counter that it was in fact Defendants Riddle, Roy Thompson and Cameron, with the acquiescence of Defendant supervisors Dr. Thompson and Olivas, who harassed, intimidated and attempted to provoke Velasam employees during the recall by taunting, screaming and cursing at Velasam employees, acting antagonistically towards Velasam, and unnecessarily and illegitimately ordering the PDRs issued by Ms. Field. *See* S. Samson Decl., ¶¶ 48-58; Durler Decl., ¶¶ 15-19. Plaintiffs claim that these Defendants then fabricated allegations of

harassment to justify suspending Velasam's inspection services. *See id.*

On January 31, 1996, Defendant Dr. Thompson suspended inspection services based on the alleged harassment of FSIS officials by Mr. Samson and Velasam employees. On February 16, 1996, Plaintiffs submitted to Defendant Dr. Thompson written assurances that Velasam would not interfere further with FSIS officials. On March 25, 1996, the FSIS Administrator filed a complaint against Velasam and Messrs. Samson, Durler and Achterberg. The same day, Plaintiffs entered into a Consent Decision and Order (first consent decree) to settle the issue, stipulating to certain requirements for reinstatement of inspection services. Velasam's inspection services were reinstated on April 4, 1996. Plaintiffs' expert claims that this suspension of inspection services for over two months is extraordinarily overlong under the circumstances. *See* Gast Decl., ¶ 10.D.

On May 14, 1996, a PDR was issued to Velasam due to the alleged fragility of a thick glass wall in its plant. Plaintiffs contend that Defendant Riddle ordered inspectors to issue the PDR even though the glass wall had been there for fifteen years and was not dangerous. Plaintiffs support this claim with evidence that the PDR was frivolous and its legitimacy was questioned by other FSIS officials. *See, e.g.*, Field Depo. at 208:15-209:18 (describing the PDR as "nitpicking"); Barrett Decl., ¶ 13. Defendants contend that Defendant Riddle had no part in the issuance of this PDR. *See* Riddle Decl., ¶ 17.

G. Hagemann Meat Co. Incidents

During the suspension of inspection services in early 1996, Velasam subcontracted with Hagemann Meat Co. so

that Velasam could process meat products at Hagemann Meat Co.'s facility using Velasam employees. At about the time that Velasam began to process meat at Hagemann Meat Co., Defendant Cameron received instructions from Defendant Dr. McGovern, his supervisor, to enforce an FMIA regulation, 9 C.F.R. § 304.1(b),[9] providing that plants are not allowed to have tenants. *See* Slavitt Decl., Ex. U. In a statement dated March 12, 1997, Defendant Cameron stated that Dr. McGovern told him "that Velasam could not send a crew into Mr. Hagemann's plant to process meat for Velasam." *Id.* Defendant Cameron informed Mr. Hagemann that Hagemann Meat Co. could not allow Velasam to be a tenant and process its meat there. *See* Hagemann Decl., ¶ 7; Cameron Dep. at 122:3-15, 127:20-128:11. Defendant Roy Thompson also investigated the situation at the request of his superior, Defendant Olivas, and told Mr. Hagemann that he was in violation of the joint tenancy rule.[10] *See* R. Thompson Dep. at 188:11-19. Mr. Hagemann resolved the problem by putting Velasam employees on Hagemann Meat Co.'s payroll, and the subcontracting arrangement continued until mid-1997.

This type of joint tenancy arrangement was already engaged in at Hagemann Meat Co. by a company known as CK Lamb, whose employees had been cutting CK Lamb products at Hagemann Meat Co. for several years. Defendant Cameron allowed CK Lamb to continue as a tenant

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[9] 9 C.F.R. § 304.1(b) states in relevant part: "Preparation of product and other operations at the establishment for which inspection is granted may be conducted only by the applicant named in the application."

[10] Defendant Roy Thompson testified that he believed CK Lamb was also in violation of the joint tenancy rule. *See* R. Thompson Dep. at 190:16-192:11.

at Hagemann Meat Co., after initially sending a letter to Mr. Hagemann stating that CK Lamb's activities appeared to violate 9 C.F.R. § 304.1(b). *See* Slavitt Decl., Ex. V. Defendant Cameron testified that, because of CK Lamb's history of processing meat at Hagemann Meat Co., he decided that CK Lamb was "grandfathered" in and not subject to the FMIA regulation and Dr. McGovern's instructions that a plant cannot have tenants, *See* Cameron Dep. at 124:5-125:11. CK Lamb continued to operate at Hagemann Meat Co. with CK Lamb employees. Defendants Dr. McGovern, Olivas and Dr. Thompson supervised Defendants Cameron and Roy Thompson's activities in relation to Velasam's tenancy arrangement with Hagemann Meat Co.

Plaintiffs also allege that in October, 1996, Defendant Stewart, who was inspecting Hagemann Meat Co. at the time, required that the company double-bag a large shipment of lamb shanks being checked for leakage at Hageman Meat Co. for Velasam as part of the subcontracting arrangement because she allegedly suspected the bags were leaking. Because Defendant Stewart required that Hagemann Meat Co. double-bag each individual cut of lamb, the shipment was delayed.

On one occasion in October or November, 1996 Gordon Durler, by then a former Velasam employee, was present at Hagemann Meat Co. while Defendant Cameron was conducting inspections. Plaintiffs claim that Defendant Cameron threatened Mr. Hagemann that he would withhold inspections and walk out if Mr. Durler "so much as look[ed] at" Defendant Cameron. *See* Hagemann Decl., ¶ 9. Defendants dispute this and explain that Defendant Cameron misunderstood one of the requirements of the first consent that Mr. Durler could not be present at

Velesam while inspections were ongoing, and believed that Defendant Cameron could not have any contact with Mr. Durler. Defendant Cameron believed that in order to comply with the consent decree he would be forced to leave the facility, which would necessitate withholding inspections. *See* Slavitt Decl., Ex. U.

H. The Hydrolyzed Plant Protein Incident

During the December 15, 1995 search, a sample of hydrolyzed plant protein (HPP), which is a component spice sprayed on meat, was retained and subsequently tested positive for sulfites at the level of 27 parts per million (ppm). Defendant Roy Thompson was aware of the positive test results by April 17 or 18, 1996. Because of the results, Defendant Olivas instructed Defendant Riddle to take a sample of HPP the next time he visited the Velasam facility. Defendant Riddle did so on May 30, 1996, while conducting a review of the plant's compliance with the first consent decree.[11] While collecting the sample, Defendant Riddle asked for the required letter of guaranty from the supplier, which Velasam could not produce. Based on this, Defendant Dr. Thompson instructed Defendant Riddle to retain the HPP and any product known to

[11] At Velasam, the HPP was stored in a two-quart bottle labeled only "hydrolyzed plant protein." There is evidence in the record that Mr. Samson prepared and mixed the HPP solution at home; there was no original manufacturer's container at Velasam at the time of the December 15, 1995 search. *See* Slavitt Decl., Ex. Q. Defendants contend that Velasam employees admitted on May 30, 1996, when Defendant Riddle took an HPP sample, that the supply of HPP was not stored at the facility, they could not produce a receipt showing where the HPP had been purchased, and they could not produce a letter of guaranty for the HPP from the supplier. *See* Riddle Decl., ¶ 18.

have been produced using that HPP, until a satisfactory letter of guaranty was produced. *See* Dr. Thompson Decl., ¶ 16. Plaintiffs claim that Velasam produced a satisfactory letter of guaranty, but the retention of the HPP and HPP-treated product was unjustifiably continued, effectively causing Velasam's plant to close. *See* J. Samson Decl., ¶ 12-18.

On June 4, 1996, Defendant Olivas learned that the HPP sampled on May 30 contained sulfites at the level of 14 ppm. As noted above, FSIS regulations prohibit the addition of sulfites to meat products. *See* 9 C.F.R. § 318.7(d). The parties dispute whether FSIS regulations permit a concentration of sulfites up to 10 ppm in finished meat products, but such a regulation would not alter the prohibition on adding sulfites to meat products.

On June 17, 1996, FSIS suspended inspection services based on the positive sulfite results, and served an administrative complaint on Velasam alleging that Velasam had produced adulterated and misbranded products that threatened public health.

On June 26, 1996, Velasam filed a complaint in this Court, seeking injunctive relief from the suspension of inspection services. *See Velasam Veal Connection v. USDA, et al.*, Case No. 96-2338 CW. On July 22, 1996, the Court granted Velasam's request for a preliminary injunction, finding in part that a serious question existed as to whether the FSIS had met the requirements for suspension of inspections without notice. *See* July 22, 1996 Order Granting Preliminary Injunction, amended on August 2, 1996. On August 6, 1996, the parties entered into a Consent Decision and Order (second consent decree) resolving

the administrative complaint. Velasam voluntarily dismissed case number 96-2338 in this Court on August 12, 1996.

I. Procedural History

Plaintiffs filed their complaint in the present case on December 13, 1996 and filed an amended and supplemental complaint on May 28, 1997. After the Court's April 13, 1998 Order granting in part and denying in part Defendants' motion for judgment on the pleadings, Plaintiffs filed a second amended complaint on August 17, 1998. The second amended complaint asserts four *Bivens*[12] causes of action: violations of their First and Fifth Amendment rights by all Defendants; violation of their Fourth Amendment rights by Defendants Hasheider and Olivas; and conspiracy to violate these constitutional rights by all Defendants. Second Amended Complaint (Complaint) at ¶¶ 111-47. Plaintiffs seek compensatory and punitive damages, as well as attorneys' fees and costs.

DISCUSSION

I. Request for Judicial Notice

Plaintiffs request that the Court take judicial notice of various documents filed in the first case brought against the USDA by Velasam on June 26, 1996, case number 96-2338. Defendants object to the Court taking judicial notice of the truth of the contents of any of the documents, but do

[12] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

not object to the Court taking judicial notice of the fact that the documents were filed in the earlier litigation.

Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of facts that are not subject to reasonable dispute because they are either generally known or capable of accurate and ready determination. Plaintiffs only seek judicial notice of the filing of various documents in the earlier litigation, not the truth of the contents of the documents. Because judicial filings are not subject to reasonable dispute and are capable of accurate and ready determination, the Court GRANTS Plaintiffs' request for judicial notice of these documents.

II. Motions to Strike and Objections to Evidence

Plaintiffs submit evidentiary objections and a request to strike portions of the declarations submitted by Defendants. Defendants submit evidentiary objections and a request to strike portions of the declarations submitted by Plaintiffs.

The Court has reviewed these evidentiary objections and has not relied on any inadmissible evidence. The Court will not discuss each objection individually. Where noted, the Court has sustained certain objections to evidence and deemed such evidence inadmissible. To the extent that the Court has relied on evidence objected to by one party, such evidence has been found admissible and the objections are overruled.

III. Summary Judgment Legal Standard

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and

when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of North Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. *Id.*; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). If the

moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan*, 929 F.2d at 1409. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323.

IV. Statute of Limitations

Defendants assert that Plaintiffs' claims arising prior to December 13, 1995, one year before the date the complaint was filed, are barred by the statute of limitations. Plaintiffs acknowledge that the statute of limitations for Plaintiffs' *Bivens* claims is one year. *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991); Cal. Civ. Proc. Code § 340(3). However, Plaintiffs argue that their claims are not barred by the statute of limitations because Defendants engaged in a continuing course of harassing conduct to retaliate against Plaintiffs for exercising their First Amendment rights. Plaintiffs maintain that many of Defendants' retaliatory acts occurred during the limitations period.

A continuing violation can "bring otherwise time-barred conduct within the statute of limitations period." *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1157 (9th Cir. 2000). To establish a continuing violation, the plaintiff must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the limitations period." *Id.*

The Court concludes Plaintiffs have propounded enough evidence from which a factfinder could infer that Defendants' actions from August, 1995 to August, 1996 were sufficiently related to constitute a continuing violation. Thus, because Plaintiffs filed their original complaint in this action on December 13, 1996, there is a dispute of material fact as to whether some of their claims are barred by the statute of limitations.

V. Qualified Immunity

Defendants assert that they are entitled to qualified immunity as to all of Plaintiffs' claims. Qualified immunity provides that "government officials . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[R]egardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

The Supreme Court recently indicated in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2156 (2001), that when ruling on the qualified immunity issue, the court must decide (1) whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right" and (2) whether the right was clearly established. *Id.* The Court also indicated that the "dispositive inquiry in determining whether a right is clearly established is

whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Thus, if the officer was not on notice that his conduct was clearly unlawful than that officer is protected from suit by qualified immunity. *See id.*

Plaintiffs' allegations, if proven true, constitute a violation of Plaintiffs' constitutional rights by Defendants. Further, the right to be free of intentional retaliation for registering complaints with congressional representatives and senior administrative officials, discussed more fully in the next section, is clearly established. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985); *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001) (government employee's speech concerning unethical conduct lies at the "core" of First Amendment protection and employee is protected from retaliatory firing); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1319 (9th Cir. 1989) ("It could hardly be disputed that at the time of the permit suspension an individual had a clearly established right to be free of intentional retaliation by government officials based upon that individual's constitutionally protected expression."); *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986) ("State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.")

No reasonable officer could have believed that he or she could retaliate for the exercise of First Amendment rights. *See, e.g., Hyland v. Wonder*, 117 F.3d 405, 412 (9th Cir. 1997), *amended on denial of reh'g by* 127 F.3d 1135 (9th Cir. 1997). Thus, to the extent that Plaintiffs' allegations survive summary judgment, Defendants are not entitled to qualified immunity.

VI. First Amendment Claim

In their first claim, Plaintiffs argue that Defendants sought to chill and punish Plaintiffs' exercise of their free speech rights. Defendants allegedly did so by illegally suspending and refusing to reinstate Velasam's inspection services, unlawfully searching Velasam's premises and seizing products without probable cause, conducting excessive inspections at Velasam, treating Velasam differently from similarly situated meat processors, destroying evidence material to this case, and otherwise harassing and intimidating Plaintiffs and their business partners. Defendants argue that Plaintiffs fail to produce evidence of sufficient facts indicating that they acted with the specific intent to retaliate against Plaintiffs for the exercise of their First Amendment rights.

As mentioned above, Plaintiffs may maintain a First Amendment *Bivens* claim against federal officials for impermissibly curbing their protected speech. *Gibson*, 781 F.2d at 1342. The Ninth Circuit has held that the government may not curtail benefits in retaliation for the exercise of free speech rights. *Soranno's Gasco*, 874 F.2d at 1314. "'State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.'" *Id.* (quoting *Gibson*, 781 F.2d at 1338). The proposition that a private citizen has a right protected by the First Amendment to complain about its government has been long settled by the United States Supreme Court. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

In order for *Bivens* plaintiffs to demonstrate that they were punished in retaliation for exercising their First Amendment rights, they must prove that the exercise of their First Amendment rights was a "substantial" or

"motivating" factor that caused the defendants' conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 750 (9th Cir. 2001); *Soranno's Gasco*, 874 F.2d at 1314; *see also Allen v. Scribner*, 812 F.2d 426, 433 (9th Cir. 1987), *amended by* 828 F.2d 1445 (9th Cir. 1987). Once the plaintiffs have met their burden, if the defendants can show that they would have taken the same action even in the absence of the First Amendment activity, the defendants will escape liability. *See Mt. Healthy*, 429 U.S. at 576; *Keyser*, 265 F.3d at 750. Simply asserting that the defendants could have taken the same action is insufficient to survive a motion for summary judgment. *See Soranno's Gasco*, 874 F.2d at 1315.

Mere evidence that a certain defendant knew of a plaintiff's complaints is not sufficient to survive summary judgment. *See Keyser*, 265 F.3d at 751. The Ninth Circuit has held that circumstantial evidence of retaliatory motive has created a genuine issue of material fact when the plaintiff, in addition to producing evidence that the defendant knew of the speech, produced additional evidence of one of three types: (1) temporal proximity between the speech and the allegedly retaliatory conduct, (2) express opposition to the speech by the defendant, or (3) explanations for the conduct that are false or pretextual. *See id.* at 751-52.

Plaintiffs are correct that their complaints in August, 1995 and October, 1995 were protected activity under the First Amendment.[13] Below the Court will address whether

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[13] Defendants cite *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)) in support of their argument that the Court should balance the interests of the State against Plaintiffs' interest in protecting speech that is a matter of

(Continued on following page)

there is sufficient evidence to support Plaintiffs' claims against each Defendant individually.[14]

A. Marlene Stewart

Plaintiffs assert that Defendant Stewart's retaliatory conduct began on August 11, 1995 when she suspended Velasam's inspection services because Plaintiffs tampered with a "U.S. Retained" tag. According to Plaintiffs, Defendant Stewart's actions in suspending inspection services

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public concern. However, the *Pickering* balancing test is applied in the context of public employees and has not been extended to circumstances such as these.

[14] Plaintiffs allege that Defendants Olivas, Dr. McGovern, Dr. Thompson and Hasheider may be held liable as supervisors of the other Defendants for participating in, or acquiescing to, their employees' retaliatory behavior. Respondeat superior is not a viable theory of *Bivens* liability. *See Bibeau v. Pacific Northwest Research Found.*, 188 F.3d 1105, 1114 (9th Cir. 1999), *amended on denial, of reh'g by* 208 F.3d 831 (9th Cir. 2000).

In the absence of respondeat superior liability, supervisors sometimes may be held liable for failures in carrying out their supervisory responsibilities, *see Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir. 1991), but some causal connection between the supervisor's conduct and the unconstitutional conduct of a subordinate must be made. *See Bibeau*, 188 F.3d at 1114 (granting summary judgment where supervisors had no substantial connection to underlying violative conduct and relied on reports of staff); *Bergquist v. County of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986) (holding supervisors are only liable for their own conduct, and "causal link between the supervisors' conduct and the deprivation of a right is key"). "A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (quoted in *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997)).

Therefore, the Court will consider the supervisory activities of these Defendants to determine whether they participated in or directed any violations, or knew of violations and failed to act to prevent them.

was in retaliation for alleged complaints to her supervisors that began on August 10.

Plaintiffs also contend that on September 6, 1995, Defendant Stewart again retaliated against them for their alleged complaints in August by sending them the letter regarding unresolved PDRs. Plaintiffs claim that Defendant Stewart's reference to the unresolved PDRs directly contradicted the instruction of her supervisor, Dr. Aquino, "that all previous PDRs would be closed and that Velasam and the USDA would start with a 'clean slate.'" S. Samson Decl., ¶ 11. Plaintiffs also assert that Defendant Stewart wrote new PDRs in late August and early September, 1995, regarding inadequate lighting and a piece of fat in a tub, in retaliation for Plaintiffs' complaints.

Lastly, Plaintiffs allege that in October, 1996, Defendant Stewart again retaliated against them for their August, 1995 alleged complaints, as well as their October, 1995 complaints to congressional representatives and senior USDA officials, by improperly requiring Hagemann Meat Co., with whom Plaintiffs were subcontracting, to double-bag lamb shanks that had been suspected of being contained in leaking bags.

Defendants counter that Defendant Stewart acted appropriately and in accordance with FSIS policy and practice in suspending inspections on August 11, 1995 based on tampering with a "U.S. Retained" tag because she found only one lamb carcass with such a tag when she had originally tagged two carcasses.

Defendants further allege that Plaintiffs have not adduced sufficient evidence that Defendant Stewart was aware of Ms. Barrett's phone messages and faxes to Defendant Stewart's supervisors and, therefore, Plaintiffs'

alleged complaints could not have been a substantial and motivating factor in Defendant Stewart's decision to suspend inspection services on August 11, 1995 and her subsequent regulatory actions.

Defendants also allege that Defendant Stewart's letter regarding past PDRS and her issuance of new PDRs were proper. Defendants dispute that Dr. Aquino promised, as part of the "clean slate," that all past PDRs would be closed. *See* Aquino Dep. at 119:18-22.

Lastly, Defendants allege that Defendant Stewart's actions were proper when she inspected Hagemann Meat Co. in October, 1996 and that the lack of proximity between the August 1995 complaints and this incident show there is no causal connection suggestive of a retaliatory motive.

Plaintiffs have failed to present sufficient evidence that the phone messages and faxes sent to Defendant Stewart's superiors constituted "complaints" as such. Ms. Barrett, the Velasam employee who made the phone calls and sent faxes, declared that she sought to "clarify" Defendant Stewart's behavior. *See* Barrett Decl., ¶¶ 5-6. These were inquiries sent to Defendant Stewart's supervisor in an attempt to understand Defendant Stewart's actions and avoid regulatory problems, not complaints. Further, Plaintiffs produce no evidence that Defendant Stewart was aware of these inquiries, or considered them to be complaints about her behavior. Though she spoke with Dr. Aquino at the time, there is no evidence that he informed her of Plaintiffs' alleged complaints. Furthermore, the facts indicate that Defendant Stewart would, have taken the same action absent Plaintiffs' alleged complaints, for the FSIS had a policy and practice of suspending inspection services due to tampering with a

"U.S. Retained" tag, and Plaintiffs are unable to dispute the essential facts: that Defendant Stewart issued a tag and tied it to two carcasses, and that it was later discovered attached only to one carcass, indicating tampering. While the details of the series of events are in dispute, the facts do not suggest retaliation by Defendant Stewart.

Given Plaintiffs' lack of sufficient evidence of actual complaints made regarding Defendant Stewart or Defendant Stewart's knowledge of the so-called complaints, as well as evidence that Defendant Stewart would have taken the same action absent the complaints, a reasonable factfinder could not conclude that Defendant Stewart's actions in suspending inspection services on August 11, 1995, sending the September 6, 1995 letter regarding past PDRs, and issuing the new PDRs were retaliatory in nature.

Moreover, Plaintiffs have adduced no evidence that the double-bagging incident had any relationship to either any August, 1995 complaints or their October, 1995 complaints to congressional representatives and senior USDA officials, which occurred a year earlier. The Hagemann Meat Co. incident is not sufficiently close in time that a reasonable factfinder could infer from the temporal proximity that this incident was in retaliation for complaints that occurred a year earlier. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 1511 (2001) (finding that "temporal proximity must be 'very close'" where it is the only circumstantial evidence of retaliation) (internal quotations omitted); *Keyser*, 265 F.3d at 752 (citing *Erickson v. Pierce County*, 960 F.2d 801, 803 (9th Cir. 1992) for the proposition that a three month proximity is not sufficient).

Therefore, Defendants' motion for summary judgment is GRANTED as to Defendant Stewart.

B. John Cameron

Plaintiffs assert that Defendant Cameron retaliated against them for asserting their First Amendment rights by complaining in August and September, 1995 about Defendant Stewart and by sending complaining letters to congressional representatives and senior USDA officials in October, 1995. While the Court has found that the initial inquiries made on August 10, 1995 to Defendant Stewart's supervisors regarding her conduct on August 9 and 10, 1995 do not constitute complaints for purposes of the retaliation claim based on Defendant Stewart's August 11 suspension of inspection services, Plaintiffs continued to complain to Defendant Stewart's supervisors in mid- to late August and September, 1995, prior to writing to congressional representatives and senior USDA officials in mid-October, 1995. Therefore, the complaints that are the basis for Plaintiffs' retaliation claims are those from mid-August through October, 1995 (August-October, 1995 complaints).

Plaintiffs allege that Defendant Cameron attempted to "entrap" them into violating recall procedures during the January, 1996 recall by telling them that they could resell recalled meat. Plaintiffs further allege that a few weeks after Plaintiffs' inspections were suspended in January, 1996, Defendant Cameron pressured Hagemann Meat Co., with whom Plaintiffs had subcontracted, not to process any more product for Velasam, even though another company, CK Lamb, also processed its meat at Hagemann Meat Co. and therefore was similarly situated.

In support of this allegation, Plaintiffs point out that both CK Lamb and Velasam were using their own employees to process meat at CK Lamb, in violation of 9 C.F.R. § 304.1(b), which disallows joint tenants in processing facilities, but only Velasam was required to stop.[15]

Defendants do not dispute that Defendant Cameron had knowledge of Plaintiffs' August-October, 1995 complaints. However, even if Defendant Cameron told Plaintiffs that they could resell the recalled meat, this is not an adverse government action. There is no evidence from which a reasonable factfinder could infer that Defendant Cameron attempted to entrap them.

Defendants argue that because CK Lamb had had its lamb processed in the Hagemann facility for the last four or five years, CK Lamb was "grandfathered" in by Defendant Cameron and allowed to continue its relationship with Hagemann Meat Co. Defendants argue that CK Lamb and Velasam were not similarly situated in this regard, and therefore Velasam was not singled out for disparate treatment.

Plaintiffs' disparate treatment argument regarding Velasam's use of the Hagemann Meat Co. facility survives summary judgment. Velasam and CK Lamb were similarly situated in every way except that CK Lamb had been

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[15] Plaintiffs also assert that Defendant Cameron assisted in execution of the December, 1995 search warrant, but do not suggest how this search was retaliatory in nature. Plaintiffs claim that Defendant Cameron threatened to withhold Hagemann Meat Co.'s inspection services if Gordon Durler, a former Velasam employee, was at the plant. This behavior has been satisfactorily explained by Defendants as a misunderstanding by Defendant Cameron of the scope of the first consent decree.

operating at Hagemann Meat Co. (in apparent violation of the rule against joint tenants) for four or five years. A reasonable factfinder could infer that Defendants' explanation that CK Lamb was "grandfathered" in by Defendant Cameron was pretextual. Defendant Cameron originally sent Hagemann Meat Co. a memorandum stating that its arrangement with CK Lamb appears to violate 9 C.F.R. § 304.1(b), *see* Slavitt Decl., Ex. V, but he never enforced the regulation against CK Lamb. Instead, Defendant Cameron enforced the regulation against Velasam only. There are genuine issues of material fact with respect to whether Defendant Cameron disparately enforced 9 C.F.R. § 304.1(b) at the Hagemann Meat Co., and if so whether he was motivated by a desire to retaliate against Plaintiffs because of their August-October, 1995 complaints. Because Defendant Cameron's reason for treating Velasam differently may be found to be pretextual, and because of the temporal proximity between Plaintiffs' complaints and Defendant Cameron's actions, a reasonable factfinder could conclude that Defendant Cameron acted with the intent to retaliate against Plaintiffs.

Therefore, Defendants' motion for summary judgment is DENIED as to Defendant Cameron. However, Plaintiffs cannot argue at trial that Defendant Cameron attempted to entrap Plaintiffs by telling them they could resell recalled meat.

C. Michael McGovern

Plaintiffs assert that Defendant McGovern retaliated against them for their August-October, 1995 complaints by allowing the October 7, 1995 suspension (which Plaintiffs

concede was due to a regulatory violation – the Saturday unauthorized work incident) to continue until October 18, 1995. Defendants do not dispute that Defendant McGovern knew about Plaintiffs' August-October, 1995 complaints.

Plaintiffs also assert that Defendant McGovern instructed Defendant Cameron to discriminate against Velasam by treating Velasam differently from CK Lamb, with regard to their contractual relationship with Hagemann Meat Co. Plaintiffs point to Defendant Cameron's March 12, 1997 statement that Defendant McGovern told him "that Velasam could not send a crew into Mr. Hagemann's plant to process meat for Velasam." *See* Slavitt Decl., Ex. U.

In support of their claims against Defendant McGovern, Plaintiffs assert that Defendant McGovern directly threatened Mr. Samson with retaliation for complaining. Further, Plaintiffs' expert asserts that the eleven-day plant closure was excessively long and was mishandled by Defendant McGovern, who refused to accept Mr. Samson's assurances that the incident would not recur.

Defendants counter that if Defendant McGovern refused to reinstate inspection services, it was because he was performing his regulatory duties. However, Defendants' claim that Defendant McGovern *could* have justifiably refused to reinstate the inspection services is insufficient to demonstrate that, absent Plaintiffs' protected activity, Defendant McGovern *would* have refused to reinstate the inspection services. *See Soranno's Gasco*, 874 F.2d at 1315. Further, the close proximity between the

August-October, 1995 complaints, Defendant McGovern's alleged direct threat of retaliation and the extended suspension in October, 1995 could give rise to an inference of retaliatory motive. *See Keyser*, 265 F.3d at 751-52. However, Defendant McGovern's instruction to Defendant Cameron that Velasam could not process meat at Hagemann Meat Co. does not support an inference of retaliation, for there is no evidence that Defendant McGovern was aware that CK Lamb was also violating the joint tenancy regulation. In the absence of such knowledge, there is no evidence that Defendant McGovern selectively enforced the joint tenancy regulation against Velasam or treated Velasam differently from a similarly situated company.

A reasonable factfinder could conclude that Plaintiffs' August-October, 1995 complaints were a substantial or motivating factor in Defendant McGovern's decision not to reinstate the inspection services prior to October 18, 1995. Therefore, the Court DENIES Defendants' motion for summary judgment as to Defendant McGovern. However, Plaintiffs may not argue at trial that Defendant McGovern treated Velasam disparately with regard to enforcement of the joint tenancy regulation.

D. Charles Riddle

Plaintiffs allege that their August-October, 1995 complaints were a substantial factor in Defendant Charles Riddle's adverse actions against them. Defendants do not dispute that Defendant Riddle had knowledge of Plaintiffs' August-October, 1995 complaints.

First, Plaintiffs assert, through evidence consisting of the testimony of their expert [sic] Mr. Gast, Mr. Samson

and Ms. Barrett, that Defendant Riddle directed or allowed inspectors to harass Plaintiffs by engaging in pre-operation inspections in December, 1995 and January, 1996 that were substantially longer and more thorough than usual. Plaintiffs claim that those inspections were designed to manufacture deficiencies that would allow inspectors to write PDRs.

Second, Plaintiffs contend that Defendant Riddle, along with Defendant Paul Thompson, directed Ms. Field to issue PDRs on January 27 and January 29, for Velasam's receipt of returned products in unwholesome or insufficiently identified condition and for insufficiently denaturing returned product, respectively. Plaintiffs maintain that the January 27 PDR was especially unjustified because the state of the returned products was out of Velasam's control, but allege that both PDRs were issued in retaliation for Plaintiffs' August-October, 1995 complaints. Defendant Riddle admits that he ordered Ms. Field to issue these PDRs.

Third, Plaintiffs assert that Defendant Riddle, along with Defendant Roy Thompson, falsely accused Plaintiffs of harassing them, which prompted the January 30, 1996 suspension of services that lasted nine weeks. Plaintiffs also contend that, in fact, it was Defendants Riddle and Thompson that were harassing and intimidating Plaintiffs.

Fourth, Plaintiffs claim that Defendant Riddle instructed inspectors to issue a PDR to Velasam on May 14, 1996 because of the alleged fragility of a thick glass wall that had been in Velasam's plant for several years. Plaintiffs support this claim with evidence that the PDR was

frivolous and its legitimacy was questioned by other FSIS officials.

Plaintiffs' evidence that the pre-operation inspections were excessively long raises a genuine issue of fact as to whether the pre-operation inspections in December, 1995 and January, 1996 were substantially longer and more thorough than those of companies who had not complained. However, Plaintiffs fail to present evidence that Defendant Riddle participated in, directed, or acquiesced in the pre-operation inspections. *See, e.g.*, Field Dep. at 64:9-65:4 (inspections directed by Akers); Gast Decl., ¶¶ 9.C; 10.D (assuming Riddle's involvement because he was Inspector Field's superior). Absent such evidence, Defendant Riddle cannot be liable for such inspections purely on the basis of his supervisory role.

Plaintiffs' contention that Defendant Riddle, along with defendant R. Thompson, made false accusations of harassment is not supported by the evidence. While Velasam employees deny any harassment of Defendants Riddle or R. Thompson, they admit that Velasam employees exchanged heated words and took photographs, and that Velasam had limousines present and heightened security. The evidence supports the conclusion that Defendant Riddle, along with Defendant R. Thompson, reasonably felt threatened and harassed by certain Velasam employees.

However, there is a material factual dispute as to whether the January 27 and 29 PDRs ordered by Defendant Riddle were motivated by a desire to retaliate, and whether Defendant Riddle, along with Defendant R. Thompson, harassed and intimidated Velasam employees during the recall in late January, 1996. Similarly, there is

a disputed question of fact whether Defendant Riddle directed the May 14, 1996 PDR regarding the glass wall, and whether, if he did, the action was in retaliation for Plaintiffs' complaints. Due in part to their temporal proximity, there is sufficient evidence from which a reasonable factfinder could conclude that Plaintiffs' August-October, 1995 complaints were a substantial or motivating factor in these actions by Defendant Riddle.

Therefore, Defendants' motion for summary judgment is DENIED as to Defendant Riddle. However, Plaintiffs may not argue at trial that Defendant Riddle ordered excessive pre-operation inspections or made false allegations of harassment.

E. Dr. Paul Thompson

Plaintiffs allege that their August-October, 1995 complaints were a substantial factor in Defendant Dr. Thompson's retaliatory conduct against them. Defendants do not dispute that Defendant Dr. Thompson had knowledge of Plaintiffs' complaints.

Plaintiffs assert that Defendant Dr. Thompson was responsible for Defendant McGovern's refusal to reinstate Plaintiffs' inspection services for several days after the October 7, 1995 Saturday work incident. In support of this assertion, Plaintiffs point to the fact that Defendant Dr. Thompson learned of the October 7, 1995 suspension of inspection prior to October 18, 1995, and later wrote a note suggesting the FSIS could be vulnerable for withholding inspections for an extended period.

Plaintiffs further contend that Defendant Dr. Thompson made the decision to suspend inspections at Velasam

in late January, 1996 in response to Defendants Riddle and Roy Thompson's allegations of harassment, which Plaintiffs contend were false, and that Dr. Thompson was responsible for the continuance of the suspension for nine weeks, from January 31 to April 4, 1996.

Plaintiffs also assert that Defendant Dr. Thompson was responsible for the allegedly retaliatory June, 1996 suspension of inspection services due to discovery of 14 ppm of sulfites in Velasam's HPP supply, as well as the retention of the HPP and HPP-treated meat product for an excessively long period of time.

Plaintiffs have not adduced evidence that Defendant Dr. Thompson was aware that Defendant McGovern allowed the October 7, 1995 suspension to continue until October 18, 1995. Plaintiffs offer no evidence that contradicts Defendant Dr. Thompson's testimony that, upon learning of the suspension between October 10 and 13, he contacted Defendant McGovern and instructed him to "do everything reasonable" to reinstate inspection services at Velasam. Dr. Thompson Decl., ¶ 9. Defendant Dr. Thompson's October 26, 1995 note does not establish that it had been his decision to maintain the suspension. Therefore, even taken in the light most favorable to Plaintiffs, the evidence is insufficient to raise a genuine issue of material fact that Defendant Dr. Thompson was aware of, much less responsible for, Defendant McGovern's decision to allow the October 7, 1995 suspension to continue unnecessarily.

As stated above, Plaintiffs have failed to rebut Defendants' evidence that Defendants Riddle and Roy Thompson reasonably felt harassed by certain Velasam employees during the recall in late January, 1996, much less show

that Defendant Dr. Thompson had reason to disbelieve their report. Therefore, Defendant Dr. Thompson's decision to suspend inspection services based on the harassment claimed by Defendants Riddle and Roy Thompson was proper. However, a reasonable factfinder could conclude that Plaintiffs' complaints were a substantial factor in Defendant Dr. Thompson's decision to maintain the resulting January to April suspension of inspection services. Moreover, the testimony of Plaintiffs' expert, Mr. Gast, that this suspension was excessively long in the industry raises an inference of retaliatory motive for Defendant Dr. Thompson's decision not to reinstate inspection services.

The suspension of inspection services in June, 1996 and the HPP retention were too attenuated in time from Plaintiffs' complaints to evidence temporal proximity sufficient to support a reasonable factfinder concluding that Defendant Dr. Thompson's decisions then were motivated by Plaintiffs' August-October, 1995 complaints. Nonetheless, Defendants' motion for summary judgment is DENIED as to Defendant Dr. Thompson. The only action by Defendant Dr. Thompson that Plaintiffs may claim was retaliatory at trial is the decision not to reinstate inspection services for nine weeks after they were suspended on January 31, 1996.

F. Roy Thompson

Defendants do not dispute that Defendant Roy Thompson was aware of Plaintiffs' August-October, 1995 complaints. Plaintiffs allege that Defendant R. Thompson retaliated against them for exercising their First Amendment rights.

First, Plaintiffs assert that Defendant R. Thompson participated in the preparation of Defendant Hasheider's affidavit submitted in support of the December, 1995 search warrant. Plaintiffs maintain that Defendant R. Thompson, along with Defendant Hasheider, was responsible for alleged falsehoods contained in Defendant Hasheider's affidavit.

Second, Plaintiffs claim that Defendant R. Thompson told two Velasam customers, Petrini's Markets and Silver Creek Country Club, either not to purchase or sell Velasam meat, or that Velasam was being investigated for adulterating meat.

Third, Plaintiffs assert that Defendant R. Thompson, along with Defendant Riddle, made false accusations about being harassed by Velasam employees on the last day of the recall. Plaintiffs assert that Defendants R. Thompson and Riddle in fact harassed Velasam employees on that day.

Plaintiffs finally assert that in February, 1996, Defendant R. Thompson instructed Hagemann Meat Co., with whom plaintiffs were subcontracting, to cease allowing Velasam employees to process Velasam's product at the Hagemann Meat Co. facility.

Plaintiffs have failed to submit sufficient evidence from which a reasonable trier of fact could conclude that Defendant R. Thompson intentionally provided Defendant Hasheider with false information to include in the affidavit for the December, 1995 search warrant. While there are some discrepancies between the affidavit and a chart of test results prepared by Defendant R. Thompson, Plaintiffs have produced no evidence as to when the chart was prepared or when certain test results were available,

such that they could have bean reported to Defendant Hasheider. Further, Plaintiffs have failed to present evidence that Defendant R. Thompson provided test result information from the chart to Defendant Hasheider, much less that he did so knowing it was false and with the intent to retaliate against Plaintiffs.

Plaintiffs have adduced a genuine issue of material fact as to whether Defendant R. Thompson told Petrini's Markets that it should not sell Velasam meat because of an ongoing investigation, or at least allowed this misunderstanding to continue. Defendant R. Thompson's alleged statements were merely two months after the August-October, 1995 complaints. Thus, Plaintiffs have adduced sufficient evidence from which a reasonable factfinder could conclude that Plaintiffs' August-October, 1995 complaints were the motivating factor in Defendant R. Thompson's statements to Petrini's Markets. Plaintiffs have failed to present admissible evidence that Defendant R. Thompson said anything to Silver Creek Country Club, however. *See supra* note 6.

As discussed above, Plaintiffs' contention that Defendant R. Thompson, along with Defendant Riddle, made false accusations of harassment is not supported by the evidence. While Velasam employees deny any harassment of Defendants R. Thompson or Riddle, they admit that Velasam employees exchanged heated words and took photographs and that Velasam had limousines present and heightened security. The evidence supports the conclusion that Defendant R. Thompson, along with Defendant Riddle, reasonably felt threatened and harassed by certain Velasam employees. However, there is a genuine dispute of fact concerning whether Defendant R. Thompson, along

with, Defendant Riddle, harassed or intimidated Velasam employees during the January, 1996 recall.

Lastly, Plaintiffs have failed to adduce sufficient evidence to raise a genuine issue of material fact as to whether Defendant R. Thompson's actions in instructing Hagemann Meat Co. to cease allowing Velasam employees to process Velasam's product at the Hagemann Meat Co. facility were retaliatory. Defendant R. Thompson was ordered by a superior to investigate Velasam's use of Hagemann Meat Co.'s facility. There is evidence that he would have treated a similarly situated tenant, such as CK Lamb, in the same manner. Defendant R. Thompson simply advised Mr. Hagemann that such joint tenancy practices may violate FSIS regulations. There is no evidence that he treated any similarly situated company differently.

Because the Court finds that a reasonable factfinder may conclude that Plaintiffs' August-October, 1995 complaints were a substantial factor motivating Defendant R. Thompson to tell Petrini's Markets not to sell Velasam's products and to harass Velasam employees, the Court DENIES Defendants' motions for summary judgment as to Defendant R. Thompson.

G. Kirk Elliott

Plaintiffs assert that Defendant Elliott retaliated against them for their August-October, 1995 complaints by purchasing product samples from two Velasam customers in order to conduct field tests for sulfites. Plaintiffs also allege that Defendant Elliott was responsible for the destruction of evidence in their freezer in May, 1997, consisting of the products that were seized and marked

"U.S. Retained" in the December 15, 1995 search. *See supra* note 7.

However, Plaintiffs do not dispute that Defendant Elliott was not aware of Plaintiffs' complaints when he made the sample purchases. *See* Elliott Decl., ¶ 7. Thus, Plaintiffs fail to adduce sufficient evidence that their complaints were a motivating factor in this conduct by Defendant Elliott. Plaintiffs have provided no evidence with which a reasonable factfinder could conclude that Defendant Elliott's participation in the incident in May, 1997 was retaliatory in nature. Further, it was too remote in time to support an inference that it was motivated by Plaintiffs' August-October, 1995 complaints. *See Keyser*, 265 F.3d at 752. Accordingly Defendant Elliott's motion for summary judgment is GRANTED.

H. Raul Olivas

Plaintiffs assert that their August-October, 1995 complaints were a motivating factor in Defendant Raul Olivas' adverse action against them. An investigation began because of Plaintiffs' complaints; Plaintiffs assert that Defendant Olivas unjustifiably shifted the focus of the investigation towards Velasam. Plaintiffs further contend that Defendant Olivas was responsible for supplying Defendant Hasheider with the results of the Malachite Green field tests on which Defendant Hasheider relied in his affidavit for a search warrant; for having compliance officers seize and test Velasam's product at various hotels and restaurants during the criminal investigation of Velasam, during which some customers, such as Petrini's Markets, were encouraged not to purchase and/or sell Velasam meat; for the decision to suspend inspection

services at Velasam in January, 1996 after other Defendants made allegations of harassment and for the length of those suspensions; for acquiescing in the decisions of others to pressure Hagemann Meat Co. not to contract with Velasam; and for the May 30, 1996 HPP testing that led to the suspension in June, 1996.

Plaintiffs have not adduced any evidence that Defendant Olivas shifted the focus of the investigation of their complaints to an investigation of Velasam. Rather, he was assigned to investigate whether Velasam had engaged in any wrongdoing by improperly importing meat. Thus, his original assignment regarding Velasam was to investigate Velasam's compliance with USDA regulations, and he merely conducted this task thoroughly by following through when he discovered suspicious evidence. Defendant Olivas was not responsible for changing the investigation of Velasam's complaints into an investigation of Velasam itself.

Plaintiffs have failed to present evidence that Defendant Olivas actually provided Defendant Hasheider with the Malachite Green field test results that were included in the affidavit, much less that Defendant Olivas knowingly provided false test results in retaliation for Plaintiffs' complaints. Further, Defendant Olivas did not mislead Defendant Hasheider regarding the reliability of the Malachite Green field test, stating (according to Hasheider) that "it was a reliable field test as an indication of the presence of sulfites." Hasheider Dep. at 67:25-68:6. Defendant Olivas' apparent failure to inform Defendant Hasheider that the Malachite Green test can result in false positives, or that the Monier-Williams test is more accurate, does not negate the test as a reliable indicator of the presence of sulfites and does not create an inference of

retaliatory motive. Plaintiffs' assertions that Defendant Olivas knowingly provided Defendant Hasheider with false information are simply not supported by the record. No reasonable factfinder could conclude that Defendant Olivas intentionally provided Defendant Hasheider with false information in an effort to retaliate against Plaintiffs.

Plaintiffs have failed to present any evidence that Defendant Olivas' supervision of the testing of Velasam products at various hotels and restaurants across the country was motivated by a desire to retaliate against Plaintiffs. The decision to conduct such testing was motivated by the suspicious evidence Defendant Olivas discovered when interviewing former Velasam employees, which would have led him to request such testing in the absence of complaints by plaintiffs. Further, even if one of Defendant Olivas' subordinates acted in a retaliatory manner, there is no evidence that Defendant Olivas directed or acquiesced in such behavior. Supervisors are not liable in a *Bivens* claim for the actions of their subordinates absent some connection between the supervisor's actions and the harm done. None is shown here. In particular, Plaintiffs have adduced no evidence that Defendant Olivas was involved in the Petrini's Markets incident.[16]

Because Plaintiffs have failed to adduce evidence that the January, 1996 suspension of inspection services based on alleged harassment of FSIS officials by Velasam employees

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[16] It was Dale Bagley, not Defendant Olivas, who allegedly told Defendant R. Thompson to forget about Petrini's Markets' apparent misunderstanding. *See* R. Thompson Dep. at 171:15-172:8.

was improper or retaliatory in nature, Defendant Olivas cannot be liable for his involvement in this action.

Plaintiffs' claim that Defendant Olivas acquiesced in the Hagemann Meat Co. incident are [sic] insufficient to raise an inference that he was retaliating against them. Because the Court has held that Defendant Roy Thompson did not single out Velasam for disparate treatment regarding the Hagemann Meat Co. incident, Defendant Olivas cannot be liable for supervising his behavior.

Plaintiffs have also failed to adduce sufficient evidence from which a reasonable factfinder could conclude that their August-October, 1995 complaints were a substantial factor in Defendant Olivas' participation in ordering the HPP testing that led to the June, 1996 suspension. Plaintiffs argue that Defendant Olivas learned on or about April 18, 1996 that a sample of HPP from the December, 1995 search tested positive for sulfites at the level of 27 ppm, but waited six weeks to retest the HPP at Velasam, creating an inference that Defendant Olivas was not concerned with public health but instead with retaliating against Plaintiffs. Plaintiffs argue elsewhere that various Defendants (including Defendant Olivas) were too quick to investigate Velasam, and now argue that Defendant Olivas was too slow in ordering the HPP testing; Plaintiffs cannot have it both ways. Failure to be diligent in requesting immediate testing does not give rise to an inference of retaliation in the absence of other evidence. Moreover, Defendant Olivas testified that he considered the HPP sampling to be urgent and requested Inspection Operations to conduct further testing the next time they were at Velasam, assuming that it would be done immediately. *See* Olivas Dep. at 227:7-228:23. Plaintiffs provide no evidentiary support for their contention that Defendant

Olivas failed to take action on the HPP results for six weeks before acting; the six week delay between the receipt of test results and further testing could be mere administrative delay. Further, regardless of when Defendant Olivas ordered the HPP sample to be taken, simply requesting that a sample be taken is not an action that can be considered retaliatory or punitive in nature.

Therefore, the Court GRANTS Defendant Olivas' motion for summary judgment.

I. Neal Hasheider

Plaintiffs assert that Defendant Neal Hasheider retaliated against them for exercising their First Amendment rights. Defendants do not dispute that Defendant Hasheider had knowledge of Plaintiffs' August-October, 1995 complaints when he became involved in the December, 1995 criminal investigation. Plaintiffs assert that Defendant Hasheider provided false information in an affidavit in support of his December 14, 1995 application for a warrant to search Velasam's premises.

Defendant Hasheider agrees that he relied on information provided to him by officials in the Compliance Program in making his affidavit. *See* Hasheider Decl., ¶ 8. Plaintiffs further assert that Defendant Hasheider failed to verify information that he included in the application, which according to Plaintiffs was false. Furthermore, Plaintiffs maintain that all of the field tests that contained positive results for sulfites were later found not to contain sulfites when tested at the FSIS laboratory.

Plaintiffs have presented evidence that Defendant Hasheider may have relied on incorrect information in his

affidavit in support of the application for the December 14, 1995 search warrant. However, Plaintiffs have failed to produce evidence that Defendant Hasheider knowingly relied on this incorrect information, or that he did so in an effort to retaliate against Plaintiffs. Plaintiffs have provided no evidence that the discrepancy in the numbers of samples tested and positive results found was known to Defendant Hasheider, or any other Defendant, at the time of the affidavit for the search warrant. *See supra* note 4 and accompanying text. Nor is the discrepancy material, because a search warrant would have been just as appropriate if the affidavit reflected that there were nine positives out of fourteen tests instead of seven of nine.

More importantly, Defendant Hasheider had no duty to confirm or verify independently the information provided to him by FSIS officials. His reliance on the information given to him by Defendants Olivas and R. Thompson does not give rise to an inference of retaliatory motive, but instead negates such an inference.

Thus, a reasonable factfinder could not conclude that Defendant Hasheider knowingly relied an false information in his affidavit in retaliation for Plaintiffs' complaints. Defendants' motion for summary judgment is GRANTED as to Defendant Hasheider.

VII. Fourth Amendment Claim

In the April 13, 1998 Order, the Court dismissed Plaintiffs' Fourth Amendment claim with leave to amend. Plaintiffs did not substantively amend this claim except to add Defendant Olivas as an actor, which does nothing to improve the claim. Therefore, the reasoning of the April 13, 1998 Order resolves this claim. The affidavit still

supports a finding of probable cause even without the allegedly false material. *See, Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148 (9th Cir. 1990). Regardless, the Court now finds that there is no evidence to support a finding that Defendant Hasheider knowingly lied or recklessly disregarded the truth in writing the affidavit. Therefore, Plaintiffs cannot allege a separate Fourth Amendment claim.

VIII. Fifth Amendment Claim

In their second cause of action, Plaintiffs assert that Defendants violated their Due Process rights under the Fifth Amendment by illegally suspending and refusing to reinstate Velasam's inspection services, searching Velasam's premises and seizing products without probable cause, issuing numerous unjustified PDRs, destroying evidence material to this litigation, and otherwise harassing and intimidating Plaintiffs and Plaintiffs' business partners without due process of law. Plaintiffs further allege that Defendants undertook these actions in retaliation for Plaintiffs' exercise of their First Amendment rights.

In its April 13, 1998 Order, this Court granted Defendants' motion for judgment on the pleadings on the objective theory of this claim, based on qualified immunity, and dismissed the subjective theory of this claim with leave to amend to allege facts indicating subjective retaliatory intent on the part of each Defendant.

Plaintiffs' Fifth Amendment claim is based on the same conduct as their First Amendment claim, for both rely on a finding of subjective retaliatory intent. The only difference is the harm done: chilling of First Amendment

speech or deprivation of property. Therefore, the Court's rulings above on Plaintiffs' First Amendment claim apply also to Plaintiffs' Fifth Amendment claim.

IX. Conspiracy To Violate Constitutional Rights Under *Bivens*

In order to state a viable conspiracy claim under *Bivens*, Plaintiffs must establish (1) the existence of an agreement among Defendants to deprive them of their constitutional rights, and (2) an actual deprivation of those rights resulting from that agreement. *Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir. 1991).

Plaintiffs allege that all Defendants are jointly liable for each other's constitutional torts because they conspired to bankrupt, and otherwise retaliate against, Plaintiffs for having exercised their First Amendment rights. Plaintiffs first point to Defendants' close participation with each other in the various suspensions of inspection services, and other adverse actions. Plaintiffs point to some Defendants' participation in meetings in Washington, D.C., some Defendants' participation in meetings with other Defendants, the collective effort to gather evidence to support the affidavit submitted in support of the application for the search warrant, and the overall participation of each Defendant in the suspensions of Plaintiffs' inspection services.

Again, the conspiracy claim is derivative of Plaintiffs' First Amendment claim. To the extent that Plaintiffs' claims against certain Defendants have survived summary judgment, a conspiracy claim may lie. The Court, therefore, rules on Defendants' motion for summary judgment

on Plaintiffs' *Bivens* conspiracy claims in accordance with its rulings above on Plaintiffs' First Amendment claim.

CONCLUSION

For the foregoing reasons, the Court rules on Defendants' motion for summary judgment (Docket No. 52) as follows: the motions of Defendants Stewart, Elliott, Olivas and Hasheider are GRANTED, and the motions of Defendants Cameron, McGovern, Riddle, Paul Thompson and Roy Thompson are DENIED with respect to Plaintiffs' First Amendment, Fifth Amendment, and conspiracy claims, with the qualifications stated above; the motions of Defendants Hasheider and Olivas are GRANTED with respect to the Fourth Amendment claim.

The Court GRANTS Defendant's request for judicial notice (Docket No. 101) and GRANTS in part and DENIES in part the motions to strike and objections to evidence (Docket Nos. 108 & 114) as stated above.

IT IS SO ORDERED.

Dated: DEC 12 2001 /s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

69 Fed. Reg. 28,041 (May 18, 2004)

DEPARTMENT OF AGRICULTURE
Office of the Secretary
7 CFR Part 1
[Docket No. 03-030F]
Indemnification of Department of Agriculture Employees
AGENCY: Office of the Secretary, USDA.
ACTION: Statement of policy; final rule.

SUMMARY: The Department of Agriculture is adding a new subpart to part 1 of title 7 of the Code of Federal Regulations. This statement of policy is similar to the policy adopted by other Federal agencies, including the Department of Treasury, Department of the Interior, Department of Health and Human Services, and the Department of Justice in that it permits indemnification of Departmental employees in appropriate circumstances, as determined by the Secretary or the Secretary's designee, for claims made against them as a result of actions taken by them in the course of their employment.

DATES: Effective May 18, 2004.

FOR FURTHER INFORMATION CONTACT: Philip S. Derfler, Assistant Administrator, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, Room 350-E, Jamie L. Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250-3700, telephone (202) 720-2709, fax (202) 720-2025.

SUPPLEMENTARY INFORMATION:

The United States Department of Agriculture (USDA) does not now have a policy to indemnify its employees who

are sued in their individual capacity and who suffer an adverse judgment as a result of conduct taken within the scope of their official duties. Lawsuits against Federal employees in their personal capacities have proliferated since the Supreme Courts decision in *Bivens v. Six Unkown* [sic] *Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This decision held that personal damage awards against a Federal employee are permitted when, in the course of his or her employment, the Federal employee is found to have violated an individual's constitutional rights. Although the Federal Liability Reform and Tort Compensation Act of 1988, Public Law 100-694, prohibits personal actions against Federal employees for common law torts committed in the course of employment, that Act does not protect employees from all other types of actions, including those arising under the Constitution. A number of actions have been filed against USDA employees. While the majority of these claims have resulted in judgments adverse to the claimants, the prospect of personal liability and the burden of defending a suit for money damages, simply as a result of doing one's job, has had a negative effect on USDA operations.

The Department believes that actions against Federal employees in their personal capacity may hinder the Department's effectiveness. Uncertainty as to what conduct may lead to a claim tends to intimidate employees and to stifle creativity and decisive action. Employees' fears of personal liability affect government operations, decision making, and policy determinations.

The Department believes that lawsuits against Federal employees in their personal capacity may constitute an impediment to the effective conduct of the public's business. A clear articulation of the Department's policy to

permit the indemnification of Department employees should go a long way toward removing this impediment.

The USDA's policy is to permit, but not require, the indemnification of a Department employee who suffers an adverse verdict, judgment, or other monetary award, provided that the actions giving rise to the judgment were taken within the scope of his or her employment, and that such indemnification is in the interest of the United States, as determined by the Secretary or the Secretary's designee. Under the same conditions, the Department may also choose to indemnify an employee who enters into a final settlement or compromise of an adverse claim.

Generally, the Department will not indemnify or pay to settle or compensate a personal damage claim against an employee before entry of an adverse verdict, judgment, or monetary award. However, in rare cases, the Secretary may determine that exceptional circumstances justify the earlier indemnification or payment of a settlement or compromise amount. This approach is designed to discourage claims against Department employees solely to pressure the Department into settlement. In the usual case, the Department will not compromise a matter before a final determination, even if a dispositive motion filed on behalf of the employee has been denied.

Once a verdict, judgment, or monetary award has been entered against an employee or a settlement proposal entered into by an employee, a Department employee may request indemnification to satisfy that verdict, judgment, award or settlement proposal. The employee shall submit a written request, with appropriate documentation that includes a copy of the verdict, judgment, award or settlement proposal, to the head of

his or her employing component. The head of the employee's employing component shall thereupon submit it to the General Counsel, in a timely manner, for a recommended disposition of the request. The Office of the General Counsel shall forward the employee's request, the employing component's recommendation, and the General Counsel's recommendation, along with the time frame in which a decision is needed, to the Secretary or his or her designee for decision. The Secretary or his or her designee will decide promptly whether to indemnify or pay for a settlement of a personal damage claim.

Administration Procedure Act

This policy relates to the Department of Agriculture management and personnel. It is published in final form without the opportunity for public notice and comment because it is a statement of policy. See 5 U.S.C. 553(b)(A).

Executive Order 12866 and the Regulatory Flexibility Act

This policy has been determined to be not economically significant for the purposes of Executive Order 12866. It will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Requirements

This policy is not subject to the Paperwork Reduction Act because it deals solely with internal rules governing Department of Agriculture personnel.

List of Subjects in 7 CFR Part 1

Administrative practice and procedure, Indemnity payments, Government employees, Claims.

■ For the reasons stated in the preamble, title 7 part 1 of the Code of Federal Regulations is amended by adding subpart N to read as follows:

SUBPART N – POLICY WITH REGARD TO INDEMNIFICATION OF DEPARTMENT OF AGRICULTURE EMPLOYEES

Authority: 5 U.S.C. 301.

§ 1.501 Policy on employee indemnification.

(a) Indemnification, under the context of this section, shall be the policy whereby the Department of Agriculture compensates an employee for the legal consequences of conduct, taken within the scope of his or her employment, giving rise to a verdict, judgment, or other monetary award rendered against the employee.

(b) The Department of Agriculture may indemnify a Department employee (which for the purposes of this regulation shall include a former employee) for any verdict, judgment, or other monetary award rendered against such employee, provided the Secretary or the Secretary's designee determines, in his or her discretion, that the conduct giving rise to such verdict, judgment, or award was taken within the scope of his or her employment with the Department, and such indemnification is in the interest of the United States.

(c) The Department of Agriculture may pay for the settlement or compromise of a personal damage claim against a Department employee by the payment of available funds, at any time, provided that the Secretary or the Secretary's designee determines, in his or her discretion, that the alleged conduct giving rise to the personal damage claim was taken within the scope of the employee's employment, and such settlement or compromise is in the interest of the United States.

(d) Absent exceptional circumstances, as determined by the Secretary or his or her designee, the Department will not entertain a request to agree to indemnify or pay for a settlement of a personal damage claim before entry of an adverse judgment, verdict, or other monetary award.

(e) When a Department employee becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify his or her supervisor that such an action is pending. The supervisor shall promptly thereafter notify the Office of the General Counsel.

(f) A Department employee may request indemnification to satisfy a verdict, judgment, or monetary award entered against the employee or to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with appropriate documentation that includes a copy of the verdict, judgment, award or settlement proposal, as appropriate, to the head of his or her employing component, who shall thereupon submit it to the General Counsel, in a timely manner, a recommended disposition of the request. The Office of the General Counsel shall seek the views of the Department of Justice.

The Office of the General Counsel shall forward the employee's request, the employing component's recommendation, and the General Counsel's recommendation, along with the time frame in which a decision is needed, to the Secretary or his or her designee for decision. The Secretary or his or her designee will decide promptly whether to indemnify or pay for a settlement of a personal damage claim.

(g) Any payment under this section to indemnify a Department employee for a personal damage verdict, judgment, or award or to settle a personal damage claim shall be contingent upon the availability of appropriated funds of the employing component of the United States Department of Agriculture.

Ann M. Veneman,
Secretary.

Supreme Court, U.S.
FILED
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No. 04-1611

In the Supreme Court of the United States

NEBRASKA BEEF, LTD., PETITIONER

v.

DENNIS GREENING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on appeal from an order denying qualified immunity, a court of appeals has jurisdiction to consider whether a cause of action should be recognized to subject the government-officer defendant to suit under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the statutory scheme governing review of actions by federal food-safety inspectors under the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, precludes the creation of a *Bivens* cause of action against inspectors personally.

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In the Supreme Court of the United States

No. 04-1611

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 398 F.3d 1080. The opinion of the district court (Pet. App. 9a-20a) is not published in the *Federal Supplement* but is *available at* 2004 WL 546900.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2005. The petition for a writ of certiorari was filed on May 31, 2005 (a Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Meat Inspection Act (Act or FMIA), 21 U.S.C. 601 *et seq.*, was enacted in 1907 to

ensure that meat and meat products are "wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. 602. To that end, the Act directs the Department of Agriculture (USDA) to inspect the sanitary conditions of meat-processing plants and "to prescribe the rules and regulations of sanitation under which such establishments shall be maintained." 21 U.S.C. 608. The Act provides that USDA inspectors shall have access to all parts of a plant at all times. 21 U.S.C. 606.

Products that are subject to inspection under the Act may not be sold or offered for sale in commerce unless they have been inspected and deemed satisfactory. 21 U.S.C. 610(c). Where the sanitary conditions of a plant are such that the meat has been "rendered adulterated," USDA must withhold the mark of inspection. 21 U.S.C. 608. Under the FMIA, meat is deemed "adulterated" if it has been "prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health." 21 U.S.C. 601(m)(4).

b. The FMIA grants the Secretary of Agriculture authority to "make such rules and regulations as are necessary for the efficient execution" of the Act. 21 U.S.C. 621. USDA regulations give meat-processing plants flexibility to design plans that will prevent food-safety hazards. See 9 C.F.R. 416.11-416.14; 9 C.F.R. Pt. 417. Inspectors with USDA's Food Safety and Inspection Services (FSIS) are responsible for monitoring a plant's compliance with its food-safety plans. See 9 C.F.R. 416.17, 417.8.

As part of the inspection process, FSIS inspectors will issue a Noncompliance Record (NR) when they identify a deviation from a plant's obligations. See FSIS

Directive 5400.5, at 9-10 (Nov. 11, 1997) <http://www.fsis.usda.gov/oppde/rdad/FSISDirectives/5400-5.pdf>. The NR is the form that FSIS uses to notify the plant of a deviation and to provide FSIS with a record of the deviation. See *ibid.* The issuance of an NR, however, does not automatically trigger an enforcement action, commencement of which depends upon the agency's evaluation of the risk to food safety posed by the particular deviation or deviations.

The regulations set out a range of enforcement actions that FSIS may take, depending on the circumstances. A "regulatory control action" includes, for example, the slowing or stopping of production lines. 9 C.F.R. 500.1(a). A "withholding action" is a refusal to allow the mark of inspection to be applied to products. 9 C.F.R. 500.1(b). A "suspension" is an interruption in the assignment of inspectors to all or part of a plant. 9 C.F.R. 500.1(c).

Under the regulations, NRs and enforcement actions may be challenged through an administrative appeals process. See 9 C.F.R. 306.5, 500.2(c), 500.5.

c. Judicial review of actions taken by FSIS in implementing the FMIA is governed by two statutes, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and 7 U.S.C. 6912(e). Under the APA, final agency action is subject to judicial review, 5 U.S.C. 704, including consideration of constitutional challenges, 5 U.S.C. 706(2)(B). The APA generally does not require a party aggrieved by an otherwise final agency action to exhaust its administrative appeals before it may obtain review in court. See 5 U.S.C. 704; *Darby* v. *Cisneros*, 509 U.S. 137 (1993). In the 1994 reorganization of the Department of Agriculture, however, Congress enacted a provision expressly mandating exhaustion of all ad-

ministrative appeal procedures before a suit may be filed against the agency (whether the suit is pleaded as one against the agency or as an official-capacity action against an agency official). See 7 U.S.C. 6912(e). Thus, even USDA actions that otherwise would be final within the meaning of the APA cannot be reviewed in court until after administrative appeals have been pursued.

2. Petitioner is a meat-packing and meat-processing plant that has operated in Nebraska since 1995. Resp. C.A. App. 10 (Compl. para. 15). The plant slaughters and processes approximately 2300 beef cattle per day. *Ibid.* (Compl. para. 16).

In this case, petitioner sought to impose personal monetary liability on respondents, USDA employees, Resp. C.A. App. 7-8 (Compl. paras. 2-8), based on actions taken by them in implementing the FMIA. For example, the complaint alleged that various NRs were issued without basis. See, *e.g.*, *id.* at 17 (Compl. para. 42). In addition, the complaint challenged a temporary suspension of inspection services based on deficiencies in the plant's food-safety systems, see *id.* at 12-13, 23 (Compl. paras. 20-27, 64), as well as decisions to stop or slow production lines in the course of inspection activity, see, *e.g.*, *id.* at 24-25 (Compl. para. 70). The complaint also alleged, without elaboration, that other plants did not receive NRs for similar conditions. *Id.* at 13-14, 21 (Compl. paras. 28, 59). And the complaint alleged that the challenged inspection actions "may have arose [sic] out of an attempt by the defendants to retaliate, discredit and force the retirement of two FSIS employees for reporting an anthrax threat and filing an EEO complaint." *Id.* at 29 (Compl. para. 84); see also *id.* at 29-33 (Compl. paras. 85-107). The complaint sought damages from individual inspectors, al-

leging that the challenged conduct violated the plant's clearly established due process, equal protection, and First Amendment rights. *Id.* at 33-34 (Compl. paras. 108-114).

Respondents filed a motion to dismiss. Pet. App. 2a-3a. They argued that the creation of a *Bivens* cause of action, see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), would be inconsistent with the scheme established by Congress for reviewing the type of agency action challenged in the complaint. Pet. App. 3a. Respondents also argued that the complaint failed to state a claim for the violation of any constitutional rights, much less clearly established rights, and that respondents were therefore entitled to qualified immunity. *Ibid.* The district court denied the motion to dismiss. *Id.* at 9a-20a.

3. The court of appeals reversed. Pet. App. 1a-8a.

a. The court first held that its jurisdiction to consider respondents' qualified-immunity claim gave it the authority to consider the antecedent question whether a *Bivens* cause of action is available in the first place. Pet. App. 3a-6a. The court reasoned that the existence of such a cause of action "is an issue of law that is 'closely related' to * * * the denial of qualified immunity"; that "addressing this potentially dispositive legal question serves the interests of judicial economy"; and that respondents should not be required to litigate to final judgment a lawsuit that, if no *Bivens* cause of action exists, was "doomed from its inception." *Id.* at 5a-6a (quoting *Drake* v. *Scott*, 812 F.2d 395, 399 (8th Cir.), aff'd on reh'g, 823 F.2d 239 (8th Cir.), cert. denied, 484 U.S. 965 (1987)).

b. On the merits, the court of appeals held that no *Bivens* cause of action should be recognized. Pet. App.

6a-8a. The court explained that this Court has been "wary of extending *Bivens* remedies into new contexts," particularly when Congress has established a "comprehensive regulatory regime." *Id.* at 6a-7a (citing *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). In declining to recognize a *Bivens* remedy here, the court of appeals relied on the fact that Congress has not "explicitly created any direct right of action against USDA employees alleged to have committed constitutional violations"; that the "comprehensive regulatory scheme" established by USDA "includes the right to judicial review under the APA"; and that Congress enacted "a stringent exhaustion requirement for grievances filed against USDA employees" in 7 U.S.C. 6912(e). Pet. App. 7a-8a.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that, on appeal from an order denying qualified immunity, a court of appeals lacks jurisdiction to decide whether a *Bivens* cause of action should be recognized. The court below correctly rejected that claim, and while the law in the Ninth Circuit is arguably to the contrary, it would be premature for the Court to resolve any circuit conflict on the issue at this time. Further review is therefore unwarranted.

a. The doctrine of qualified immunity, which protects public officials who have not violated a clearly established constitutional right, is designed to ensure that "the vigorous exercise of official authority" is not deterred by the threat of personal monetary liability. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). Because that threat arises not only from the risk of a damages award, but also from the burdens of trial and pretrial

proceedings, an order denying qualified immunity is subject to immediate appeal. *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985). In *Siegert* v. *Gilley*, 500 U.S. 226 (1991), this Court held that, on appeal of a denial of qualified immunity, a court of appeals is not limited to a determination of whether the constitutional right alleged to have been violated was clearly established. *Id.* at 232. *Siegert* requires a court of appeals to address first the threshold question whether there has been a violation of "a constitutional right at all," *ibid.*, even though the denial of a motion to dismiss for failure to state a claim ordinarily would not be subject to immediate appeal. As the Court explained, resolving that "purely legal question," a "necessary concomitant" to the question whether the right at issue was clearly established, serves the purposes of qualified immunity, by sparing the defendant "not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Ibid.*

For the same reasons, it is appropriate for a court hearing an appeal concerning a claim of qualified immunity to consider the threshold question whether a cause of action is even available under *Bivens*, and thus whether the government-officer defendant is subject to suit at all. As the court of appeals explained, that question is "purely legal"; it is "analytically antecedent to, and in a sense also pendent to, the qualified immunity issue"; it is potentially "dispositive"; and deciding it "serves the interests of judicial economy." Pet. App. 5a-6a (quoting *Drake* v. *Scott*, 812 F.2d 395, 399 (8th Cir.), aff'd on reh'g, 823 F.2d 239 (8th Cir.), cert. denied, 484 U.S. 965 (1987)). Cf. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 204-205 (1996) (under 28 U.S.C. 1292(b), court of appeals can exercise jurisdiction over

any issue fairly included within certified order). The court of appeals correctly recognized that federal officers should not be burdened with "the cost and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception." Pet. App. 6a.

b. Petitioner contends (Pet. 14-18) that the court of appeals' decision on the jurisdictional issue conflicts with decisions of the Seventh and Ninth Circuits. The Seventh Circuit case on which petitioner relies, however, did not present the question whether, on appeal from a denial of qualified immunity, the court of appeals has jurisdiction to consider whether a *Bivens* cause of action exists. That case, an action against state officials under 42 U.S.C. 1983, was a qualified-immunity appeal in which the court of appeals was asked to decide a statute-of-limitations issue and an issue of standing, neither of which had any bearing on the facial validity of the complaint or whether the defendant was subject to suit at all. *Triad Assocs., Inc.* v. *Robinson*, 10 F.3d 492, 496 n.2 (7th Cir. 1993). The Ninth Circuit case on which petitioner relies, *Kwai Fun Wong* v. *United States*, 373 F.3d 952 (2004), did address the question whether the court had jurisdiction in a qualified-immunity appeal to decide whether a *Bivens* cause of action exists, *id.* at 961, but the court's conclusion that it did not was not necessary to the disposition of the case, because the Ninth Circuit ultimately held that the plaintiffs had not alleged the violation of a clearly established constitutional right, and that the defendants were therefore entitled to qualified immunity, *id.* at 966-977. Strictly speaking, therefore, the Ninth Circuit's resolution of the jurisdictional issue in *Kwai Fun Wong* was dictum, and future panels of the Ninth Circuit may treat it as such. The Ninth Circuit reached the same conclusion in an earlier case, *Pelletier*

v. *Federal Home Loan Bank*, 968 F.2d 865, 871 (1992), but an aspect of the court's resolution of the jurisdictional issues in *Pelletier* was rejected by this Court as reflecting an unduly narrow view of the law, see *Behrens* v. *Pelletier*, 516 U.S. 299, 308-309 (1996). It is possible, therefore, that future panels of the Ninth Circuit will be reluctant to follow the decision insofar as it addressed the question presented here.[1]

Even if the rule in the Ninth Circuit is in fact contrary to the rule adopted by the Eighth Circuit in this case, it would be premature for the Court to grant certiorari at this time. As evidenced by the relatively few decisions that have considered the issue, the jurisdictional question in this case does not appear to arise with much frequency.[2] If the Ninth Circuit holds in a future qualified-immunity case that it has no jurisdiction to decide whether a *Bivens* cause of action exists, the federal-officer defendants can petition for rehearing en banc, and, if they prevail, any circuit conflict will be eliminated.[3] That would obviate the need for review by this Court. And regardless of whether the Ninth Circuit addresses the question en banc, "further consideration

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[1] *Kwai Fun Wong* was cited in a recent Ninth Circuit case, *Sissoko* v. *Rocha*, 412 F.3d 1021, 1028 (2005), but the reason the court declined to consider whether a *Bivens* cause of action existed in *Sissoko* was that the question was not decided by the district court or certified for interlocutory appeal, *ibid.*

[2] As far as we are aware, the only other court of appeals to address the question is the Tenth Circuit, which, in a 1989 decision, reached the same conclusion that the Eighth Circuit reached here. *Hill* v. *Department of the Air Force*, 884 F.2d 1318, 1320, cert. denied, 495 U.S. 947 (1990).

[3] The defendants in *Kwai Fun Wong* had no occasion to petition for en banc review on the jurisdictional issue, because the Ninth Circuit's decision on qualified immunity made them the prevailing parties.

* * * of the problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray* v. *New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).[4]

2. Petitioner also contends (Pet. 18-26) that it has a *Bivens* cause of action against respondents. The court of appeals correctly held otherwise, and its decision on that point does not conflict with any decision of any other court of appeals. Further review on that question is therefore unwarranted as well.

a. In *Bivens*, this Court recognized a cause of action for damages against federal law-enforcement agents who allegedly violated the plaintiff's Fourth Amendment rights. The Court's more recent decisions, however, "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68-69 (2001) (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). The Court has emphasized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Id.* at 69 (quoting *Schweiker*, 487 U.S. at 421-422). To the contrary, when "the design of a

[4] There is no need to hold the petition pending this Court's decision in *Will* v. *Hallock*, cert. granted, 125 S. Ct. 2547 (2005). The question presented in that case is whether the "judgment bar" of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2676, prevents an unsuccessful FTCA claimant from bringing a *Bivens* action against the federal employee whose acts gave rise to the FTCA claim, and this Court has directed the parties to address the additional question whether an order denying a motion to dismiss on the basis of the judgment bar is immediately appealable. The jurisdictional issue in *Will* v. *Hallock*, *supra*, thus does not involve a qualified-immunity appeal.

Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Court has not created additional remedies under *Bivens*. *Schweiker*, 487 U.S. at 423. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to create a *Bivens* cause of action for federal employees seeking to challenge personnel decisions even though "existing remedies [did] not provide complete relief," *id.* at 388, and there was no remedy at all for short suspensions or adverse personnel actions against probationary employees, *id.* at 385 n.28.

The court of appeals correctly applied these principles in holding that the comprehensive scheme for review of actions by federal food-safety inspectors under the FMIA precludes the creation of a *Bivens* cause of action against the inspectors personally. Congress has provided through the APA the means of raising challenges—including constitutional challenges—to the type of agency actions at issue here. See 5 U.S.C. 706(2)(B). Final agency action (such as a suspension) is subject to judicial review; review of non-final action (such as an NR) is precluded by congressional design. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997); see also *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 131 (1939) ("ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding"). Judicial review is based on the record compiled before the agency. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985). And under 7 U.S.C. 6912(e), exhaustion of administrative remedies is a prerequisite to APA review. The court of appeals correctly recognized that creating a *Bivens*

cause of action under these circumstances would circumvent the statutory constraints on judicial review of the agency's actions.

b. Contrary to petitioner's contention (Pet. 19-20), no court of appeals has reached a contrary conclusion. Indeed, no other court of appeals has addressed the question presented here. That includes the Sixth Circuit, in *Krusinski* v. *USDA*, No. 92-4026, 1993 WL 346858 (Sept. 10, 1993) (4 F.3d 994) (per curiam), the case on which petitioner principally relies (Pet. 19-20). Although a *Bivens* action against USDA inspectors was allowed to proceed in *Krusinski*, the Sixth Circuit did not address the question whether the cause of action was precluded by the statutory scheme, and there is no indication in the opinion that any such argument was even made. In any event, *Krusinski* is an unpublished decision and therefore is "not binding precedent." *Bell* v. *Johnson*, 308 F.3d 594, 611 (6th Cir. 2002).

Nor does the other court of appeals decision on which petitioner relies (Pet. 20), *Love* v. *United States*, 915 F.2d 1242 (9th Cir. 1990), conflict with the decision below. In *Love*, which involved a challenge to the liquidation of farm property after the plaintiffs defaulted on an agricultural loan, the Ninth Circuit held only that the availability of a remedy against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671-2680, did not prevent the plaintiffs from suing employees of USDA's Farmers Home Administration under *Bivens* as well. 915 F.2d at 1248-1249 (citing *Carlson* v. *Green*, 446 U.S. 14 (1980)). Like *Krusinski*, *Love* did not address the question whether the applicable regulatory scheme precluded recognition of a *Bivens* cause of action, and it certainly did not address the question whether that was true of the regulatory scheme *at issue here*, because the

case did not involve the inspection of meat-processing plants.

Petitioner also relies (Pet. 20, 24, 25-26) on a number of district court decisions. But only two of them, *Sheehy* v. *Wehlage*, No. 02-CV-592A, 2004 WL 951367 (W.D.N.Y. Feb. 3, 2004), and *Veal Connection Corp.* v. *Thompson*, No. C 96-04486 CW (N.D. Cal. Dec. 12, 2001), involved a *Bivens* action against USDA inspectors, and in those cases, as in *Krusinski* and *Love*, there is no indication that the court addressed the question presented here. In any event, any conflict between a district court decision and the decision below would not provide a basis for certiorari. See Sup. Ct. R. 10.

Finally, petitioner relies (Pet. 21) on USDA's policy on employee indemnification, 7 C.F.R. 1.501. But publication of that policy hardly presupposes, as petitioner contends, that "the agency itself" has been unable to "form a consensus" on "whether a *Bivens* remedy exists" in a case of this type. Pet. 21. The policy applies to all USDA employees (not merely food-safety inspectors), and simply reflects the agency's recognition that "actions against Federal employees in their personal capacity," if they are recognized in particular contexts, tend to "intimidate employees" and "stifle creativity," thereby "hinder[ing] the Department's effectiveness." *Indemnification of Department of Agriculture Employees*, 69 Fed. Reg. 28,041 (2004). This Court made a similar observation in declining to recognize a *Bivens* cause of action in *Schweiker* v. *Chilicky*, *supra*, where it noted that "[t]he prospect of personal liability for official acts * * * would undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established." 487 U.S. at 425.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

Pursuant to Rule 15.8 of the Rules of this Court, the Solicitor General, on behalf of respondents, respectfully calls the Court's attention to an intervening matter not available when the brief in opposition was filed.

The second question presented in the petition is whether, on appeal from an order denying qualified immunity, a court of appeals has jurisdiction to consider whether a cause of action should be recognized to subject the government-officer to suit under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Hartman* v. *Moore*, cert. granted, No. 04-1495 (June 27, 2005), the Court will decide whether law enforcement agents may be liable under *Bivens* for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause. In the merits brief in

Hartman, which was filed on August 26, 2005, the federal law enforcement officer-petitioners argue that a criminal defendant has no right under the First Amendment to be free from a prosecution supported by probable cause that was motivated by the defendant's speech. 04-1495 Pet. Br. 19-36. The *Hartman* petitioners also point out that, if the Court wished to reserve the broader First Amendment question, it could decide the case on the narrower ground that the absence of probable cause is an element of a damages cause of action for retaliatory prosecution under *Bivens*. *Id.* at 36-37. In a footnote, the *Hartman* brief notes that limiting the holding to the context of a *Bivens* cause of action could implicate the jurisdictional question that is presented in this case (because *Hartman*, too, was an appeal from an order denying qualified immunity). *Id.* at 37 n.12. The footnote goes on to say that, although courts have provided different answers to the jurisdictional question, the decision of the court of appeals in this case is correct. *Ibid.*

There is no need for the Court to hold the petition in this case pending its decision in *Hartman*. First, the principal issue in *Hartman* is the broader issue of whether the respondent has a claim under the First Amendment at all. The Court would have no need to reach the jurisdictional question in that case unless it limited its holding to the *Bivens*/Section 1983 context. Second, the court of appeals in this case correctly held that there is no cause of action under *Bivens*. See Br. in Opp. 10-13. The ultimate outcome is therefore likely to be the same regardless of whether the court of appeals should have decided that question on appeal from an order denying qualified immunity.

Respectfully submitted.

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Solicitor General

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Supreme Court, U.S.
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No. 04-1611

In The
Supreme Court of the United States

NEBRASKA BEEF, LIMITED,

Petitioner,

v.

DENNIS GREENING, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL MEAT ASSOCIATION, AMERICAN MEAT INSTITUTE, AMERICAN ASSOCIATION OF MEAT PROCESSORS, SOUTHWESTERN MEAT ASSOCIATION, AND EASTERN MEAT PACKERS ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL MEAT ASSOCIATION, AMERICAN MEAT INSTITUTE, AMERICAN ASSOCIATION OF MEAT PROCESSORS, SOUTHWESTERN MEAT ASSOCIATION, AND EASTERN MEAT PACKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This *amici curiae* brief is submitted on behalf of the National Meat Association, American Meat Institute, American Association of Meat Processors, Southwestern Meat Association, and Eastern Meat Packers Association.[1] Petitioner Nebraska Beef Limited and Respondents Dennis Greening, et al. have consented to the filing of this brief. The correspondence regarding the *Amici's* requests for consent have been filed in the office of the Clerk.

I. INTEREST OF *AMICI CURIAE*

National Meat Association ("NMA") is a non-profit industry organization with its principal office in Oakland, California. NMA has served the interests of the meat industry since 1946. NMA is a well-recognized voice on important issues of meat policy, processing and safety in the U.S. All of its 250 general members are inspected by the Food Safety and Inspection Service ("FSIS"), the agency of the United States Department of Agriculture ("USDA") charged with administering the Federal Meat Inspection Act ("FMIA"). Petitioner is one of NMA's members and as a

[1] This brief was authored by outside counsel for the *Amici*. Counsel for a party did not author this brief. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief. *See* Sup. Ct. R. 37.6. Although Petitioner is a member of the National Meat Association, it has not made any financial contribution to this brief's preparation or submission.

result the *Amicus* is familiar with this case.[2] NMA is interested in ensuring that other members are not subject to retaliation for exercising their First Amendment rights.

American Meat Institute ("AMI") is a non-profit, national trade association, whose members are producers, packers, and processors of meat and poultry products marketed in the United States. AMI represents its members for purposes of furthering and protecting their interests, general welfare, and prosperity. AMI member companies account for more than 75 percent of the United States output of beef products.

American Association of Meat Processors ("AAMP") is America's largest meat trade organization. AAMP's members include more than 1,700 medium-sized and smaller meat, poultry and food businesses, including slaughterers, packers, processors, wholesalers, in-home food service businesses, retailers, deli and catering operators, and industry suppliers.

Southwestern Meat Association's ("SMA") members are meat processors, packers and purveyors, meat and meat product suppliers and service providers, livestock producers, financial institutions, and retail establishments. The primary focus of SMA's member companies is to produce products that meet or exceed consumer expectations

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[2] For example, the Executive Director of NMA accompanied the principals of Nebraska Beef to a meeting with senior officials of USDA in Washington, DC to discuss the retaliatory behavior of certain inspectors at the company's facility and was with the principals when they received a call right before the meeting from one of the inspector's supervisors. The supervisor called to inform the principals that their business was summarily closed in the middle of the morning shift, with many animals waiting to be processed.

with regard to product safety, nutrition and value. On behalf of its members, SMA initiates opportunities and resolves problems, thus helping to allow its member companies to earn a reasonable return on investment.

Eastern Meat Packers Association ("EMPA") is a non-profit organization that has represented the interests of its members since 1927. Its membership consists primarily of small to medium-sized meat and poultry processing firms located in the northeastern United States. EMPA represents its members on a wide variety of public policy issues at the state and federal level and conducts various educational programs. Virtually all of its processing members utilize beef as a major ingredient in their processing operations.

II. SUMMARY OF ARGUMENT

This *amici curiae* brief is submitted in support of petitioner's request for a writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit. The Petitioner raises two questions in its request. This brief addresses the second question presented – whether a *Bivens* cause of action is available to a meat company in the event employees of USDA retaliate against the company for exercise of its constitutional rights?

The meat industry is one of the most heavily regulated industries in the United States. Whenever meat slaughter or processing operations are conducted, a USDA in-plant inspector must be present. Depending on the operations, one or more inspectors are assigned to each establishment. For slaughter establishments, such as the Petitioner's, there are ten or more inspectors assigned. These assignments last for at least six months and often

longer. As a result, the same in-plant inspector(s) arrive when the establishment opens and leave when the shift/establishment ends for the day. These inspectors will inspect both the product and the operating facilities. If a food safety concern is raised, these inspectors have the power to stop operations, condemn products, and, in certain cases, suspend or close the business. Overall, during these lengthy tours of duty, the relationship between the regulator and the regulated are maintained on a professional basis, where both sides work to ensure the safety and wholesomeness of the products manufactured.

There are rare occasions where a personal animus develops between an inspector and an inspected company stemming from the company's appeal of one or more of the inspector's decisions or for some other exercise of the company's constitutional rights. Since the inspector will continue to be at the establishment on a daily basis, the inspector has the ability to retaliate by stopping production at critical times or taking regulatory action against product even if no food safety concern is present. Even if the actions are later reversed by the official's superiors, the damage has been done. With enough such disruptions, a company can simply be put out of business due to loss of customer goodwill and the costs of unwarranted business disruption. There is no adequate remedy for the loss of a business attributable to such conduct.

In egregious cases of official misconduct, lower courts have recognized an action against the officials for violation of constitutional rights under a *Bivens* theory.[3] The continued

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[3] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This case recognized a cause of action

(Continued on following page)

availability of this remedy is necessary to preserve the constitutional rights of meat establishments, when there has been retaliation, and to deter such conduct.

III. ARGUMENT

A. THE EIGHTH CIRCUIT'S DECISION CHILLS THE CONSTITUTIONAL RIGHTS OF FSIS-INSPECTED ESTABLISHMENTS

Under the FMIA, all meat products to be distributed in commerce must first be inspected by the federal government and marked as "Inspected and Passed."[4] This applies to carcasses and meat (21 U.S.C. § 604) and meat food products (21 U.S.C. § 606). This inspection and marking is performed by FSIS inspectors.[5]

The FMIA charges the in-plant inspector with determining whether the establishment is conducting its operations in a sanitary manner and that the products are not adulterated before he or she applies the mark of inspection. 21 U.S.C. §§ 604, 606 & 608. In the event the inspector finds the conditions of the establishment are not sanitary, the inspector can refuse to permit operations,

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against federal officials directly under the Constitution for violation of constitutional rights.

[4] This requirement applies to all products in interstate commerce, and, if the state does not have an inspection system equal to the federal system, all products in intrastate commerce must be inspected by federal officials. 21 U.S.C. §§ 610(c)(2) & 661.

[5] Section 21 of the FMIA, 21 U.S.C. § 621, authorizes the Secretary of Agriculture to appoint inspectors to conduct the mandatory inspections. The Secretary delegated his authority to the Under Secretary for Food Safety, 7 C.F.R. § 2.51, who, in turn, delegated to the Administrator of FSIS, 7 C.F.R. § 2.53.

and if the product is "adulterated," the product is rejected and must be condemned. These types of actions are referred to as "regulatory control action[s]." 9 C.F.R. § 500.1(a). In cases where the in-plant inspector takes a regulatory control action, the action and the basis for the action are documented on a non-compliance report ("NR"). Hence, in many cases, an NR is not a simple citation of a regulatory non-compliance, but a documentation of a regulatory control action which affected product, operations, or both.

In fulfilling his or her duties, the inspector has to make literally hundreds of judgments on a daily basis. These include application of the legal definition of adulteration;[6] determinations as to sanitation; and administration of and compliance with over 300 pages of regulations, not counting the dozens of "Directives," "Notices," "Question and Answer" documents, and other informal policies issued by FSIS to its inspectors. In short, inspection, of necessity, involves subjective judgments by the individual inspectors. With subjectivity comes the potential for disagreements as to the correctness of the inspector's decision.

The system generally works well. In the vast majority of cases, this is due to the professionalism of the inspector and establishment. In most other cases, the potential abuse of inspection authority is prevented and/or mitigated by USDA's management oversight. Yet, there are

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[6] The adulteration language of the FMIA, 21 U.S.C. § 601(m), was taken from Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 342. Although there have been few cases under the FMIA, there have been hundreds of cases interpreting the FDCA's "adulteration" language.

rare, but unfortunate situations where an inspector retaliates because an establishment has exercised its First Amendment right to appeal an inspector's decision or an inspector's personal conduct.[7]

Given the practical consideration of the perishability of the raw meat, when an inspector repeatedly stops production, appealing to the inspector's supervisors may result in the loss of the marketability of the product regardless of the supervisor's decision. There is a saying in the fresh meat industry: "sell it or smell it." This fact, coupled with concerns of retaliation from the inspector the next day, account for the relatively infrequent appeals of inspector decisions. Moreover, the supervisors, especially at the higher levels, are not at the plant, and may rarely or never have visited the plant. As a result, supervisors are inclined to rely on the inspector's description of the incident, rather than initiate any independent verification. In short, the perishability of the commodity combined with the company's mandated daily relationship with its inspector and the practical limitations of the appeals process can effectively chill the company's constitutional rights.

The fact that the system works as well at it does, enabling Americans to enjoy the safest and lowest cost meat in the world, is a testament to the professionalism of both meat companies and FSIS inspectors. However, the fact remains that a "rogue" inspector, with the authority to take regulatory control actions and with little immediate

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[7] Conduct issues which establishments have appealed include alleged sexual harassment of establishment employees. These appeals are usually not well-received by an inspector, and an establishment often makes these appeals at the risk of facing a strained inspection relationship with its in-plant inspector in the future.

supervision, can improperly close a business if he or she wishes to retaliate against an establishment.

B. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH *BIVENS* AND ITS PROGENY BY HOLDING THAT FSIS INSPECTORS CANNOT BE HELD LIABLE FOR VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE ESTABLISHMENTS THEY INSPECT

Prior to the Eighth Circuit's decision in *Nebraska Beef*, there was little doubt that a *Bivens* action may be brought against an FSIS inspector for intentional violation of an establishment's constitutional rights.

The first *Bivens* action brought against USDA involved a different regulatory scheme, but the potential damage to a company was the same – being put out of business. In *Butz v. Economou*, 438 U.S. 478 (1978), a formerly-registered futures commission merchant brought suit under the *Bivens* theory against the Secretary of Agriculture and various Department officials for allegedly violating his constitutional rights. In finding that the *Bivens* cause of action would apply to USDA officials exercising discretion, this Court noted:

> If . . . all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs.

438 U.S. at 505.

To be sure, the officials have "qualified immunity," but this immunity from suit does not and should not protect an official when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).[8]

For FSIS inspectors, there have been two cases that recognized a *Bivens* remedy. In the first, *Krusinski v. United States Department of Agriculture*,[9] the Sixth Circuit recognized that a *Bivens* remedy against inspectors in their individual capacity could be sought on the basis of harassment of the owner due to his ethnicity.

In the second, *The Veal Connection v. Thompson*,[10] the company filed a *Bivens* suit against several FSIS officials, including the inspectors and the inspectors' supervisors. The regulatory actions taken against the company were alleged to have been taken to retaliate against the company for registering complaints with congressional representatives and senior administration officials. The District Court, discussing the qualified immunity claim, found that "No reasonable officer could have believed that he or she could retaliate for the exercise of First Amendment rights."[11]

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[8] In the instant case, the issue before the Eighth Circuit involved the issue of qualified immunity – that court, *sua sponte*, decided that no *Bivens* action would lie, mooting the qualified immunity issue.

[9] 4 F.3d 994 (Table) (Unpublished Disposition) (provided in Nebraska Beef's petition at 78a).

[10] (Unpublished Decision) (provided in Nebraska Beef's petition at 89a).

[11] *Id.* at 117a.

Moreover, there seems to be no doubt on the part of FSIS itself that its inspectors and other officials are subject to *Bivens* lawsuits. On May 18, 2004, the USDA issued a final regulation (without prior notice) to establish a regulation authorizing indemnification of its employees. *See* 69 Fed. Reg. 28041.[12] It would seem that if the agency charged with enforcement of the FMIA has not questioned the applicability of a *Bivens* remedy, the principle is well established.

1. FSIS-Inspected Establishments Require the Availability of a *Bivens* Remedy to Protect Their Constitutional Rights and to Assure an Unbiased Relationship with Their Inspectors

As discussed above, the in-plant inspector wields considerable power over the life of an establishment. He or she can stop operations or reject product, regardless of a business necessity to ship product. In the event the inspector is motivated by an intent to retaliate against the establishment because the establishment had appealed a previous decision, there is little a company can do. It cannot ignore the inspector's regulatory action; to do so is illegal. The company can appeal the action, but as discussed above, appeals may not provide timely relief, even assuming the supervisor will not defer to the inspector's characterization of the non-compliance.

The purpose of a *Bivens* remedy is to provide relief in limited instances when government officials have exceeded

[12] The contact identified in the Federal Register Notice is the Assistant Administrator of FSIS.

their authority in egregious ways that violate citizens' constitutional rights. There have been few *Bivens* actions against FSIS inspectors because typically those officials act within the parameters of their authority and the law. Nonetheless, as noted by this Court in *Butz v. Economou*, the presence of a *Bivens* remedy "deter[s] federal officials from committing constitutional wrongs." 438 U.S. at 505.

In short, without a *Bivens* remedy, inspectors wield unfettered power over the establishments they oversee. The availability of a *Bivens* remedy serves as a limited check on inspectors that deters against retaliation for an establishment's exercise of its constitutional rights.

2. A *Bivens* Remedy for FMIA Cases Is Permitted by the FMIA, Acknowledged by USDA and Desired by Establishments to Preserve Their Constitutional Rights

Given there is a dispute among the circuits on whether a *Bivens* remedy applies to protect meat establishments from inspector retaliation when exercising their First Amendment rights, the Petitioner has requested that this Court issue a writ of certiorari. Mindful that this Court is wary of extending *Bivens* remedies into new contexts, *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988), the *Amici* respectfully submit that such a remedy is essential for the fair operation of the Federal Meat Inspection Act and that such a remedy has been applied previously in this context. No factor identified by the Eighth Circuit negates such a conclusion.

First, the absence of congressional authority is not determinative. Relying on the analysis of this Court in *Butz v. Economou*, in the absence of congressional authority, a

court may "think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim." *Id.* at 503 (citations omitted). On the type of injury, the *Amici* are concerned about the very loss of a business, which is an irreparable injury. *C & K Manufacturing v. Yeutter*, 749 F. Supp. 8 (D.D.C. 1990). As regards the questions which may be posed in a *Bivens* case involving the FMIA, the question is not whether an incident constituted non-compliance, but whether the establishment's exercise of its First Amendment right was a "substantial" or "motivating" factor that caused the inspector's conduct. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The courts are more than qualified to handle such motivation inquiries.

Second, the regulatory scheme of the FMIA, with its right of appeal, is not always conducive to resolving problems caused by a rogue inspector. When an establishment is closed or when product is spoiling or when livestock are standing in the temporary holding pens waiting to be processed on a cold January day, appeal of the in-plant inspector's action may not be a viable alternative. Moreover, since many decisions are based on the condition of product or the establishment, which are not and most often cannot be viewed by the supervisory personnel, the rogue inspector's description governs, thus negating an independent (and unbiased) review.

Third, the exhaustion provision cited by the court below, 7 U.S.C. § 6912(e), is not determinative because, for the reasons discussed above, that provision is not applicable to a *Bivens* remedy. By its terms, the provision applies to administrative appeal provisions established by law or

by the Secretary. The FMIA does not provide any administrative procedures for the conduct here.[13] Moreover, the "Uniform Rules of Practice" established by the Secretary only permit complaints for violation of the statutes administered by the Secretary.[14] A *Bivens* remedy does not involve violation of a statute administered by the Secretary, but violation of the Constitution. Indeed, should the Secretary have wanted to adopt some administrative proceeding to deal with a Bivens action, he or she could have done so in conjunction with the promulgation of the regulation governing indemnification for *Bivens* suits, 7 C.F.R. § 1.1501. Moreover, in the only case addressing this section, the court found that § 6912(e) was not a jurisdictional prerequisite, at least in the case of a bankruptcy proceeding. *See In re Cottrell*, 213 B.R. 33 (MD Ala. 1997).

[13] The only administrative procedure mentioned in the FMIA deals with withdrawal of inspection if the establishment or a responsible individual has been convicted of certain crimes. *See* Section 401 of the FMIA, 21 U.S.C. § 671.

[14] Specifically, any person may request an administrative proceeding "regarding an apparent violation of any provision of a statute (administered by USDA) or any regulation, standard, instruction, or order issued pursuant thereto." 7 C.F.R. § 1.133(a)(1).

IV. CONCLUSION

As argued by the Petitioner, and supported by the additional foregoing reasons, the *Amici* respectfully request that this Honorable Court grant Petitioner's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

NEBRASKA BEEF, LIMITED,

Petitioner,

v.

DENNIS GREENING, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 1, 2006, and (2) granting the petition. In the alternative, petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 1, 2006, and (2) granting the petition and remanding the matter to the Eighth Circuit for proceedings consistent with this Court's opinion in *Hartman v. Moore*, No. 04-1495 (U.S. Argued Jan. 10, 2006, decided Apr. 26, 2006). As grounds for this motion, petitioner states the following:

I. This Court's stance regarding the scope of a qualified immunity appeal announced in *Hartman v. Moore*, No. 04-1495 (U.S. Argued Jan. 10, 2006, decided Apr. 26, 2006), further exposes the error made by the Eighth Circuit and thus, there still exists an unresolved and uncertain area of law on which circuit courts differ.

This Court recently added to its precedent surrounding the scope of appellate jurisdiction when interlocutory appeal is taken of a denial of qualified immunity pursuant to *Mitchell v. Forsythe*, 472 U.S. 511 (1985). In *Hartman*, this Court considered whether a *Bivens* plaintiff, in a retaliatory-prosecution action, must plead and prove the absence of probable cause for pressing the underlying criminal charges. *Hartman*, No. 04-1495, slip op. at 6. In a footnote, this Court noted Moore's contention that appellate jurisdiction was exceeded when the appellate courts looked at the probable cause issue. *Id.* at n.5. However, this Court correctly noted that the issue simply raised the question of what elements must be pled and proven in

order to win. *Hartman*, No. 04-1495, slip op. at 6 n.5. In fact, this Court made itself very clear that "our holding does not go beyond a definition of an *element* of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." *Id.* (*emphasis added*).

Unlike the situation presented in *Hartman*, the Eighth Circuit in this case did not simply determine that Nebraska Beef neglected to plead an essential element of its cause of action. Rather, the Eighth Circuit completely bypassed any determination of the contours of the cause of action: the constitutional violations alleged to have been violated and whether a reasonable inspector would have been aware of the constitutional rights alleged to have been violated. Instead it chose to exercise jurisdiction to find that *no* cause of action existed at all, thus obviating the need to even address any aspect of the qualified immunity defense being appealed. Clearly, such a holding goes "beyond a definition of an element of the tort." *See Hartman*, slip op. at 6, n.5.

The finding of proper jurisdiction in *Hartman* only underscores the error made by the Eighth Circuit in the pending case. The Eighth Circuit's decision to consider the availability of a *Bivens* remedy directly contradicts the precedent established by this Court in *Hartman* as well as *Siegert v. Gilley*, 500 U.S. 226 (1991), *Johnson v. Jones*, 515 U.S. 304 (1995) and *Behrens v. Pelletier*, 516 U.S. 299 (1996). Accordingly, this Court could grant this Petition and remand with instructions to the Eighth Circuit to enter an order consistent with *Hartman* and its other precedent.

Furthermore, *Hartman* underscores the need for clarification of the scope of an interlocutory appeal under

Mitchell. In addition to the Tenth Circuit (*Hill v. Dep't of the Air Force*, 884 F.2d 1321 (10th Cir. 1989)[1]), the Eighth Circuit not only differed with Supreme Court precedent, but it directly brought itself at odds with the established law of the Ninth Circuit (*Kwai Fun Wong v. U.S.*, 373 F.3d 952 (9th Cir. 2004)) and the Third Circuit (*Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993)). Indeed, since the original Petition was filed, the Ninth Circuit has reaffirmed its conformance with Supreme Court precedence and divergence from the Eighth Circuit's *Nebraska Beef* decision in *Sissoko v. Rocha*, 440 F.3d 1145 (9th Cir. 2006). There the Ninth Circuit noted that "the existence of a *Bivens* remedy is not jurisdictional." *Sissoko v. Rocha*, 440 F.3d at 1154 (9th Cir. 2006) *citing*, *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1082-84 (8th Cir. 2005).

II. The denial of a *Bivens* remedy against USDA employees presents an issue of independent importance and should be considered by this Court because of its reaching national implication and the Eighth Circuit's departure from precedent in denying Nebraska Beef the remedy afforded by other circuit courts.

Even assuming the appropriateness of the Eighth Circuit's exercise of expanded jurisdiction on a *Mitchell*-type

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[1] In its opinion, the Eighth Circuit cited *Hill* as support for its extension of jurisdiction. *See Nebraska Beef*, 398 F.3d at 1083-84 (also citing *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2nd Cir. 1999), though the correlation between the Eighth Circuit's ruling and *Merritt* is less direct because the Second Circuit seemed to utilize an amalgamation of law on interlocutory jurisdiction and it specifically disclaimed reaching the issue of the *Bivens* allegations brought therein. *See Merritt*, 187 F.3d at 266 n.2).

appeal, petitioner presents the important issue of whether a *Bivens* cause of action is available against individual USDA inspectors. The Eighth Circuit now specifically prohibits a *Bivens* cause of action against USDA inspectors for their unconstitutional conduct in carrying out their official duties. Other courts have allowed such actions to be brought. Allowing this disparity among the courts does not allow for the uniform enforcement of laws.

As noted in petitioner's original petition and the brief of *amici curiae*[2] this Court has previously allowed a *Bivens* cause of action in the context of a suit against individual employees of the USDA in *Butz v. Economou*, 438 U.S. 478 (1978). Likewise, the Sixth Circuit has specifically allowed a suit against the same class of Food Safety Inspection Services employees at issue in this case. *See Krusinski v. USDA*, 4 F.3d 994 (Table) 1993 WL 346858 (6th Cir.) (unpublished) (reproduced in Nebraska Beef's petition at 78a).

Similarly, since the time of the original petition filed by Nebraska Beef this Court, under *Hartman*, has allowed a *Bivens* claim against federal postal inspectors. Additionally, the Tenth Circuit has held that a *Bivens* remedy is available against other federal government actors. Specifically, in *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006), the court allowed a *Bivens* suit against individual employees of the Bureau of Land Management. The Tenth Circuit specifically noted that the Administrative Procedures Act ("APA") did not preclude a *Bivens* suit to redress individual actions unrelated to final agency action. Conversely,

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[2] Submitted on behalf of the National Meat Association, American Meat Institute, American Association of Meat Processors, Southwestern Meat Association, and Eastern Meat Packers Association.

the Eighth Circuit below disallowed this *Bivens* suit, in part, because it found that the APA provided an adequate remedy for Nebraska Beef. *See Nebraska Beef, Ltd. v. Greening*, 398 F.3d at 1084. This disparity showcases the uncertainty of the circuit courts as to the nature of *Bivens* claims and their availability to those regulated by federal agencies.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari and in the brief of *amici curiae*, the petition for rehearing should be granted, the petition for writ should be granted and petitioner respectfully requests this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Alternatively, petitioner respectfully requests that the petition for rehearing be granted, the petition for writ of certiorari be granted and this Honorable Court remand this matter for further proceedings consistent with its opinion in *Hartman*.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

William M. Lamson, Jr.